

B 2
STORAGE



Digitized by the Internet Archive
in 2022 with funding from
University of Toronto

<https://archive.org/details/31761114691850>

CA20N
LR
-054

Government
Publications

ONTARIO LABOUR RELATIONS BOARD REPORTS



January 1990



ONTARIO LABOUR RELATIONS BOARD

Chair M.G. MITCHNICK

Alternate Chair R.O. MACDOWELL

Vice-Chairs
M. BENDEL
L. DAVIE
N.V. DISSANAYAKE
R.A. FURNESS
O.V. GRAY
R.J. HERMAN
B. HERLICH
R.D. HOWE
B. KELLER
P. KNOFF
J. McCORMACK
M. NAIRN
K. O'NEIL
K. PETRYSHEN
N.B. SATTERFIELD
I.M. STAMP
G. SURDYKOWSKI
S.A. TACON


Members

J. ANDERSON
B.L. ARMSTRONG
C.A. BALLENTINE
F.C. BURNET
W.A. CORRELL
K.S. DAVIES
A.R. FOUCAULT
W.N. FRASER
W. GIBSON
P.V. GRASSO
A. HERSHKOVITZ
M. JONES
F. KELLY
J. KENNEDY
H. KOBRYN
J. KURCHAK
J. LEAR
D.A. MacDONALD
W.J. McCARRON
C. McDONALD
R.D. McMURDO

T. MEAGHER
R.R. MONTAGUE
J.W. MURRAY
W.S. O'NEILL
D.A. PATTERSON
H. PEACOCK
R.W. PIRRIE
J. REDSHAW
K.V. ROGERS
J.A. RONSON
M.A. ROSS
M. ROZENBERG
J.A. RUNDLE
G.O. SHAMANSKI
R.M. SLOAN
E.G. THEOBALD
J. TRIM
M. VUKOBRAT
S. WESLAK
W.H. WIGHTMAN
N.A. WILSON
D.G. WOZNIAK

Registrar T.A. INNISS

Board Solicitors K.A. MacDONALD
P.S. TOOP



ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1990] OLRB REP. JANUARY

EDITOR: PERCY TOOP

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario



CASES REPORTED

1. Atcost Soil Drilling Inc.; Re L.I.U.N.A., Ontario Provincial District Council; Re I.U.O.E., Local 793; Re Group of Employees	1
2. Bakelite Thermosets Limited; Re Vinod Mohindra	3
3. Beaverbrook Estates Inc.; Re L.I.U.N.A., Local 183	13
4. Berto's Restaurant Inc.; Re Marjorie Meighan; Re Hotel Motel and Restaurant Employees Union, Local 442	17
5. Carleton Roman Catholic Separate School Board; Re C.U.P.E.; Re Group of Employees ..	19
6. Gilmar Electric Inc.; Re I.B.E.W., Local 1739; Re Group of Employees	20
7. Gottcon Contractors Limited, Gottardo Properties Limited, Gottardo Contracting (1980) Inc., Gottardo Contracting Co. Limited, Gottardo Holdings Company Ltd., Gottardo Management Limited, and Gottardo Corporation; RE L.I.U.N.A., Local 506; Re B.M.I.U., Local 1	25
8. Grant Forest Products, Grant Industries Corp. and Grant Forest Products Corp. c.o.b. as; Re C.P.U.; Re Grant Forest Products Employees' Association	45
9. Hamilton-Wentworth Roman Catholic Separate School Board Professional Staff Association, The; Re C.U.P.E.; Re Group of Employees	49
10. Hiram Walker & Sons Limited; Re I.U.O.E., Local 796; Re C.U.O.E., Local 100	52
11. Inzola Construction (1976) Limited; Re L.I.U.N.A., Ontario Provincial District Council; Re Group of Employees	53
12. Lorlea Steels, A Division of Jannock Steel Fabricating Company; Re Ontario Sheet Metal Workers' Conference	57
13. MacMillan Bloedel Building Materials Limited; Re Local 2693, IWA-Canada	58
14. McIntyre, Wilf, Fred Miron, Roland Frayne, Niels Husman, Larry Duhaime and I.W.A. - Canada, Local 2693; Re Prosper Brizzard, Richard Brizzard, Robert Casson, Richard Koski, David Jaggard, Manfred Krause, Robert Krause, David Ross, Aulus Tiitto, Darrell Westover, Raynard Jacobson, Bruce Nordstrom and Larry Jaggard; Re Gravel and Lake Services Limited	64
15. Palmerston, Town of; Re Robert A. Wallace; Re U.F.C.W., Local 175	65
16. Pinkerton's of Canada; C.G.A.; Re Richard Bibeault; Re Inco Limited; Re Attorney-General of Ontario; Re National Protective Services Company Limited; Re George Faulkenburg; Re Board of Management for the Metropolitan Toronto Zoo; Re International Union United Plant Guards, Local 1962; Re Ron Saxton; Re Burns International Security Services Limited; Re Gordon A. Southorn; Re Wackenhut of Canada Limited; Re Shane Freeman; Re U.S.W.A.; Re Larry Bishop	68
17. Russell H. Stewart Construction Company Limited; Re I.U.O.E., Local 793; Re Group of Employees	79
18. Spider-Maple Lift Limited and/or Spider Waste Management Services and/or Innisfil Landfill Corporation; Re I.U.O.E., Local 793	81
19. Steelfabco Inc.; Re S.M.W., Local 562	83

20.	Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 91; Re Clarence Edwin Muir; Re Acklands Limited by Uni-Select Inc.	89
21.	Toronto Transit Commission Wheel Trans Department; Re Everette Chappelle	90
22.	Transit Windsor, Re A.T.U., Local 616; Re Group of Employees.....	94
23.	Vaughan, The Corporation of the Town of, and Tokmakjian Limited; Re A.T.U., Local 1587; Re Group of Employees.....	102
24.	W.C. Wood Co. Ltd.; Re William James Kerr	105

COURT PROCEEDINGS

1.	Great Lakes Fishermen and Allied Workers' Union and Ontario Labour Relations Board; Re 504578 Ontario Limited, carrying on business as Murray Collard Fisheries, Jim Fraser Fisheries Ltd., H. Tiessen Fisheries Ltd., Favignana Fishing Co. Limited, A. Figliomeni & Sons Limited, Four Brothers Fishing Co., 538391 Ontario Limited operating as Peralta Foods, CP Fisheries Ltd., Family Fishery Company Ltd.	117
2.	Ontario Legal Aid Plan, The; Re Ontario Public Service Employees Union, Ontario Labour Relations Board, Neighbourhood Legal Services, Injured Workers' Consultants, Tenant Hotline Inc. and Community Legal Education Ontario	118

SUBJECT INDEX

<p>Accreditation - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer signing supplementary document to collective agreement between union and contractors association - Employer not member of association and signing subsequent to main parties - Employer not signing later agreement which extended terms of first agreement - Employer bound by bargaining relationship and accreditation provisions</p> <p>STEELFABCO INC.; RE S.M.W., LOCAL 562</p>	83
<p>Adjournment - Practice and Procedure - Counsel for respondent requesting adjournment on day before hearing - "Personal and business" reasons preventing respondent from retaining qualified counsel and preparing case - Request untimely and without cogent basis - Adjournment denied</p> <p>SPIDER-MAPLE LIFT LIMITED AND/OR SPIDER WASTE MANAGEMENT SERVICES AND/OR INNISFIL LANDFILL CORPORATION; RE I.U.O.E., LOCAL 793 ..</p>	81
<p>Bargaining Rights - Bargaining Unit - Certification - Trade union in displacement application agreeing with employer and previous union to unit smaller than that represented by previous union - Other union retaining bargaining rights for residual categories of employees not covered by application - No employees currently in such categories - No indication of abandonment by other union - Certificate issuing</p> <p>HIRAM WALKER & SONS LIMITED; RE I.U.O.E., LOCAL 796; RE C.U.O.E., LOCAL 100</p>	52
<p>Bargaining Unit - Bargaining Rights - Certification - Trade union in displacement application agreeing with employer and previous union to unit smaller than that represented by previous union - Other union retaining bargaining rights for residual categories of employees not covered by application - No employees currently in such categories - No indication of abandonment by other union - Certificate issuing</p> <p>HIRAM WALKER & SONS LIMITED; RE I.U.O.E., LOCAL 796; RE C.U.O.E., LOCAL 100</p>	52
<p>Bargaining Unit - Certification - Construction Industry - Related Employer - Labourers' union seeking certification under provincial ICI sector provisions for employees of related employer - Bricklayers' union already holding bargaining rights for bricklayers' assistants with related employer - Labourers' seeking bargaining unit description excluding bricklayers' assistants for whom other union holding bargaining rights - Certificate issuing</p> <p>GOTTCON CONTRACTORS LIMITED, GOTTARDO PROPERTIES LIMITED, GOTTARDO CONTRACTING (1980) INC., GOTTARDO CONTRACTING CO. LIMITED, GOTTARDO HOLDINGS COMPANY LTD., GOTTARDO MANAGEMENT LIMITED, AND GOTTARDO CORPORATION; RE L.I.U.N.A., LOCAL 506; RE B.M.I.U., LOCAL 1</p>	25
<p>Bargaining Unit - Certification - Employee - Employer seeking exclusion of operations supervisors - Predecessor position excluded by Board decision involving same union and employer for different bargaining unit ten years earlier - Exclusion issue not raised in subsequent bargaining - Application of <i>res judicata</i> or estoppel inappropriate - Passage of time and change in title providing credible context for assertion of changed circumstances warranting review - Interim certificate not precluding commencement of bargaining - Interim certificate issuing</p> <p>TRANSIT WINDSOR; RE A.T.U., LOCAL 616; RE GROUP OF EMPLOYEES.....</p>	94

II

Bargaining Unit - Certification - Practice and Procedure - Pre-Hearing Vote - Displacement application for pre-hearing vote for unit broader than held by incumbent - Board practice in such situations to establish two voting constituencies of incumbent unit and add-on segment - Applicant union must have requisite support in each voting constituency to be entitled to a vote in each - Board directing vote in two separate constituencies GRANT FOREST PRODUCTS, GRANT INDUSTRIES CORP. AND GRANT FOREST PRODUCTS CORP. C.O.B. AS; RE C.P.U.; RE GRANT FOREST PRODUCTS EMPLOYEES' ASSOCIATION	45
Bargaining Unit - Union Successor Status - Board having no jurisdiction to amend bargaining unit description - Board jurisdiction confined to declaration of successor status with all rights, privileges, and duties of predecessor, or dismissal of application - Carving out of separate unit for technicians inappropriate in any event since objections unrelated to union merger - Declaration of union successor status issuing HAMILTON-WENTWORTH ROMAN CATHOLIC SEPARATE SCHOOL BOARD PROFESSIONAL STAFF ASSOCIATION, THE; RE C.U.P.E.; RE GROUP OF EMPLOYEES	49
Certification - Bargaining Rights - Bargaining Unit - Trade union in displacement application agreeing with employer and previous union to unit smaller than that represented by previous union - Other union retaining bargaining rights for residual categories of employees not covered by application - No employees currently in such categories - No indication of abandonment by other union - Certificate issuing HIRAM WALKER & SONS LIMITED; RE I.U.O.E., LOCAL 796; RE C.U.O.E., LOCAL 100	52
Certification - Bargaining Unit - Construction Industry - Related Employer - Labourers' union seeking certification under provincial ICI sector provisions for employees of related employer - Bricklayers' union already holding bargaining rights for bricklayers' assistants with related employer - Labourers' seeking bargaining unit description excluding bricklayers' assistants for whom other union holding bargaining rights - Certificate issuing GOTTCON CONTRACTORS LIMITED, GOTTARDO PROPERTIES LIMITED, GOTTARDO CONTRACTING (1980) INC., GOTTARDO CONTRACTING CO. LIMITED, GOTTARDO HOLDINGS COMPANY LTD., GOTTARDO MANAGEMENT LIMITED, AND GOTTARDO CORPORATION; RE L.I.U.N.A., LOCAL 506; RE B.M.I.U., LOCAL 1	25
Certification - Bargaining Unit - Employee - Employer seeking exclusion of operations supervisors - Predecessor position excluded by Board decision involving same union and employer for different bargaining unit ten years earlier - Exclusion issue not raised in subsequent bargaining - Application of <i>res judicata</i> or estoppel inappropriate - Passage of time and change in title providing credible context for assertion of changed circumstances warranting review - Interim certificate not precluding commencement of bargaining - Interim certificate issuing TRANSIT WINDSOR; RE A.T.U., LOCAL 616; RE GROUP OF EMPLOYEES	94
Certification - Bargaining Unit - Practice and Procedure - Pre-Hearing Vote - Displacement application for pre-hearing vote for unit broader than held by incumbent - Board practice in such situations to establish two voting constituencies of incumbent unit and add-on segment - Applicant union must have requisite support in each voting constituency to be entitled to a vote in each - Board directing vote in two separate constituencies GRANT FOREST PRODUCTS, GRANT INDUSTRIES CORP. AND GRANT FOREST PRODUCTS CORP. C.O.B. AS; RE C.P.U.; RE GRANT FOREST PRODUCTS EMPLOYEES' ASSOCIATION	45

Certification - Certification Where Act Contravened - Charter of Rights and Freedoms - Collective Agreement - Collective agreement having terms favourable to older workers - Employer arguing agreement discriminates on basis of age contrary to <i>Human Rights Code</i> and <i>Charter of Rights and Freedoms</i> - Board finding no discriminatory intent or effect - Not every distinction between groups constitutes discrimination - Provision not such as to prevent certification or cause collective agreement to be deemed not collective agreement - Board denying intervenor status to Human Rights Commission - Certificate issuing	
GILMAR ELECTRIC INC.; RE I.B.E.W., LOCAL 1739; RE GROUP OF EMPLOYEES	20
Certification - Charter of Rights and Freedoms - Evidence - Natural Justice - Practice and Procedure - Witness - Employee sidesperson while former MPP had objected in Legislature to provision of Act - Constitutionality of provision challenged in current proceedings - Employer alleging reasonable apprehension of bias - Board rejecting allegation - Board members appointed because of labour relations experience - Remarks made in different context nineteen years ago - Union seeking to call expert witness on content of freedom of association in European countries - Evidence analogous to legal argument about proper scope of freedom of association - Evidence not admissible in determining content of <i>Charter</i> freedom - Evidence admissible in determining whether provision reasonable limit to <i>Charter</i> freedom	
PINKERTON'S OF CANADA; C.G.A.; RE RICHARD BIBEALT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHRN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP	68
Certification - Construction Industry - Employer engaged in drilling to obtain rock and soil samples for engineering firms - Engineering firms using samples to determine appropriateness of area for future construction - Time lag of up to 10 years between drilling and commencement of actual construction work - Employer not engaged in construction industry	
ATCOST SOIL DRILLING INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES	1
Certification - Construction Industry - Practice and Procedure - Parties agreeing to removal of two names from "Schedule A" employee list - Employer later asserting these individuals should be included for purposes of count - Board not permitting parties to resile from agreement	
BEAVERBROOK ESTATES INC.; RE L.I.U.N.A., LOCAL 183	13
Certification - Construction Industry - Petition - Reconsideration - Union leading evidence showing sole petitioner had lied during evidence at certification application - Credibility critical in one-person petition - Union satisfying criteria of new evidence and due diligence - Certificate issuing	
INZOLA CONSTRUCTION (1976) LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES	53
Certification - Fraud - Practice and Procedure - Reconsideration - Allegation that employee who circulated petition was union agent with no intention to file petition or appear before Board	

IV

- Allegation, if true, may constitute fraud and abuse of Board's process - Matter set down for hearing	
RUSSELL H. STEWART CONSTRUCTION COMPANY LIMITED; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES.....	79
Certification - Natural Justice - Representation Vote - Employer unable to post Notice to Employees of vote result until day before time fixed for objections - Board ordering posting of decision extending time for objection	
CARLETON ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE C.U.P.E.; RE GROUP OF EMPLOYEES	19
Certification - Trade Union Status - Applicant citing recognition as employee organization by Ontario Public Service Labour Relations Tribunal - Trade union status question of fact in each case - Board having regard for applicant's history as bargaining agent for Crown employees - Applicant fitting statutory definition	
VAUGHAN, THE CORPORATION OF THE TOWN OF, AND TOKMAKJIAN LIM- ITED; RE A.T.U., LOCAL 1587; RE GROUP OF EMPLOYEES.....	102
Certification Where Act Contravened - Certification - Charter of Rights and Freedoms - Collec- tive Agreement - Collective agreement having terms favourable to older workers - Employer arguing agreement discriminates on basis of age contrary to <i>Human Rights Code</i> and <i>Charter of Rights and Freedoms</i> - Board finding no discriminatory intent or effect - Not every distinction between groups constitutes discrimination - Provision not such as to pre- vent certification or cause collective agreement to be deemed not collective agreement - Board denying intervenor status to Human Rights Commission - Certificate issuing	
GILMAR ELECTRIC INC.; RE I.B.E.W., LOCAL 1739; RE GROUP OF EMPLOYEES.....	20
Charter of Rights and Freedoms - Certification - Certification Where Act Contravened - Collec- tive Agreement - Collective agreement having terms favourable to older workers - Employer arguing agreement discriminates on basis of age contrary to <i>Human Rights Code</i> and <i>Charter of Rights and Freedoms</i> - Board finding no discriminatory intent or effect - Not every distinction between groups constitutes discrimination - Provision not such as to pre- vent certification or cause collective agreement to be deemed not collective agreement - Board denying intervenor status to Human Rights Commission - Certificate issuing	
GILMAR ELECTRIC INC.; RE I.B.E.W., LOCAL 1739; RE GROUP OF EMPLOYEES.....	20
Charter of Rights and Freedoms - Certification - Evidence - Natural Justice - Practice and Proce- dure - Witness - Employee sidesperson while former MPP had objected in Legislature to provision of Act - Constitutionality of provision challenged in current proceedings - Employer alleging reasonable apprehension of bias - Board rejecting allegation - Board members appointed because of labour relations experience - Remarks made in different context nineteen years ago - Union seeking to call expert witness on content of freedom of association in European countries - Evidence analogous to legal argument about proper scope of freedom of association - Evidence not admissible in determining content of <i>Charter</i>	

freedom - Evidence admissible in determining whether provision reasonable limit to *Charter* freedom

PINKERTON'S OF CANADA; C.G.A.; RE RICHARD BIBEALT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHRN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP

68

Collective Agreement - Accreditation - Construction Industry - Construction Industry Grievance
- Employer signing supplementary document to collective agreement between union and contractors association - Employer not member of association and signing subsequent to main parties - Employer not signing later agreement which extended terms of first agreement - Employer bound by bargaining relationship and accreditation provisions

STEELFABCO INC.; RE S.M.W., LOCAL 562

83

Collective Agreement - Certification - Certification Where Act Contravened - Charter of Rights and Freedoms - Collective agreement having terms favourable to older workers - Employer arguing agreement discriminates on basis of age contrary to *Human Rights Code* and *Charter of Rights and Freedoms* - Board finding no discriminatory intent or effect - Not every distinction between groups constitutes discrimination - Provision not such as to prevent certification or cause collective agreement to be deemed not collective agreement - Board denying intervenor status to Human Rights Commission - Certificate issuing

GILMAR ELECTRIC INC.; RE I.B.E.W., LOCAL 1739; RE GROUP OF EMPLOYEES

20

Constitutional Law - Judicial Review - Employer appealing decision of Divisional Court upholding Board's jurisdiction to issue certification order in commercial fishing industry - Federal constitutional jurisdiction over fisheries restricted to protection and preservation of fisheries as public resource - Federal constitutional jurisdiction not extending to business of commercial fishing - Labour relations of commercial fishing falling within provincial jurisdiction over property and civil rights - Board having jurisdiction to issue certification order - Appeal dismissed

GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION AND ONTARIO LABOUR RELATIONS BOARD; RE 504578 ONTARIO LIMITED, CARRYING ON BUSINESS AS MURRAY COLLARD FISHERIES, JIM FRASER FISHERIES LTD., H. TIESSEN FISHERIES LTD., FAVIGNANA FISHING CO. LIMITED, A. FIGLIOMENI & SONS LIMITED, FOUR BROTHERS FISHING CO., 538391 ONTARIO LIMITED OPERATING AS PERALTA FOODS, CP FISHERIES LTD., FAMILY FISHERY COMPANY LTD.

117

Construction Industry - Bargaining Unit - Certification - Related Employer - Labourers' union seeking certification under provincial ICI sector provisions for employees of related employer - Bricklayers' union already holding bargaining rights for bricklayers' assistants with related employer - Labourers' seeking bargaining unit description excluding bricklayers' assistants for whom other union holds bargaining rights - Certificate issuing

GOTTCO CONTRACTORS LIMITED, GOTTARDO PROPERTIES LIMITED, GOTTARDO CONTRACTING (1980) INC., GOTTARDO CONTRACTING CO. LIMITED, GOTTARDO HOLDINGS COMPANY LTD., GOTTARDO MANAGEMENT LIMITED, AND GOTTARDO CORPORATION; RE L.I.U.N.A., LOCAL 506; RE B.M.I.U., LOCAL 1

25

VI

Construction Industry - Accreditation - Collective Agreement - Construction Industry Grievance - Employer signing supplementary document to collective agreement between union and contractors association - Employer not member of association and signing subsequent to main parties - Employer not signing later agreement which extended terms of first agreement - Employer bound by bargaining relationship and accreditation provisions STEELFABCO INC.; RE S.M.W., LOCAL 562	83
Construction Industry - Certification - Employer engaged in drilling to obtain rock and soil samples for engineering firms - Engineering firms using samples to determine appropriateness of area for future construction - Time lag of up to 10 years between drilling and commencement of actual construction work - Employer not engaged in construction industry ATCOST SOIL DRILLING INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES	1
Construction Industry - Certification - Practice and Procedure - Parties agreeing to removal of two names from "Schedule A" employee list - Employer later asserting these individuals should be included for purposes of count - Board not permitting parties to resile from agreement BEAVERBROOK ESTATES INC.; RE L.I.U.N.A., LOCAL 183	13
Construction Industry - Certification - Petition - Reconsideration - Union leading evidence showing sole petitioner had lied during evidence at certification application - Credibility critical in one-person petition - Union satisfying criteria of new evidence and due diligence - Certificate issuing INZOLA CONSTRUCTION (1976) LIMITED; RE L.I.U.N.A, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES	53
Construction Industry - Construction Industry Grievance - Collective agreement requiring payment by "cash" or "cheque" - Employer paying by direct deposit into employees accounts with financial institution - Payment by "cash" or "cheque" meaning payment of legal tender directly to worker, not through agent financial institution LORLEA STEELS, A DIVISION OF JANNOCK STEEL FABRICATING COMPANY; RE ONTARIO SHEET METAL WORKERS' CONFERENCE	57
Construction Industry Grievance - Accreditation - Collective Agreement - Construction Industry - Employer signing supplementary document to collective agreement between union and contractors association - Employer not member of association and signing subsequent to main parties - Employer not signing later agreement which extended terms of first agreement - Employer bound by bargaining relationship and accreditation provisions STEELFABCO INC.; RE S.M.W., LOCAL 562	83
Construction Industry Grievance - Construction Industry - Collective agreement requiring payment by "cash" or "cheque" - Employer paying by direct deposit into employees account with financial institution - Payment by "cash" or "cheque" meaning payment of legal tender directly to worker, not through agent financial institution LORLEA STEELS, A DIVISION OF JANNOCK STEEL FABRICATING COMPANY; RE ONTARIO SHEET METAL WORKERS' CONFERENCE	57
Employee - Bargaining Unit - Certification - Employer seeking exclusion of operations supervisors - Predecessor position excluded by Board decision involving same union and employer for different bargaining unit ten years earlier - Exclusion issue not raised in subsequent bargaining - Application of <i>res judicata</i> or estoppel inappropriate - Passage of time and change in title providing credible context for assertion of changed circumstances warranting review	

- Interim certificate not precluding commencement of bargaining - Interim certificate issuing

TRANSIT WINDSOR; RE A.T.U., LOCAL 616; RE GROUP OF EMPLOYEES..... 94

Employee Reference - Practice and Procedure - Respondent complaining to Board about Labour Relations Officer designated to inquire into employee duties and responsibilities - Practice Note 4 establishing procedure for objections - Matters not specifically covered by Practice Note to be handled by analogy - Officer having discretion over proceedings within parameters of Practice Note and Board direction - Board ruling on complaint appropriate only after receipt of Officer's report and parties' submissions

MCINTYRE, WILF, FRED MIRON, ROLAND FRAYNE, NIELS HUSMAN, LARRY DUHAIME AND I.W.A. - CANADA, LOCAL 2693; RE PROSPER BRIZZARD, RICHARD BRIZZARD, ROBERT CASSON, RICHARD KOSKI, DAVID JAGGARD, MANFRED KRAUSE, ROBERT KRAUSE, DAVID ROSS, AULIUS TIITTO, DARRELL WESTOVER, RAYNARD JACOBSON, BRUCE NORDSTROM AND LARRY JAGGARD; RE GRAVEL AND LAKE SERVICES LIMITED 64

Employer Support - Evidence - Practice and Procedure - Termination - Applicant's evidence raising possibility employees given time off work to sign termination petition - Scenario relevant to voluntariness and employer support - Board ordering employer to provide union with opportunity to review and photocopy time cards for all bargaining unit employees

BERTO'S RESTAURANT INC.; RE MARJORIE MEIGHAN; RE HOTEL MOTEL AND RESTAURANT EMPLOYEES UNION, LOCAL 442..... 17

Environmental Protection Act - Employee terminated for acting in compliance with, or seeking enforcement of, *Environmental Protection Act* - Employee not seeking reinstatement - Appropriate measure of damages actual loss and not notice period under *Employment Standards Act*

BAKELITE THERMOSETS LIMITED; RE VINOD MOHINDRA 3

Evidence - Certification - Charter of Rights and Freedoms - Natural Justice - Practice and Procedure - Witness - Employee sidesperson while former MPP had objected in Legislature to provision of Act - Constitutionality of provision challenged in current proceedings - Employer alleging reasonable apprehension of bias - Board rejecting allegation - Board members appointed because of labour relations experience - Remarks made in different context nineteen years ago - Union seeking to call expert witness on content of freedom of association in European countries - Evidence analogous to legal argument about proper scope of freedom of association - Evidence not admissible in determining content of *Charter* freedom - Evidence admissible in determining whether provision reasonable limit to *Charter* freedom

PINKERTON'S OF CANADA; C.G.A.; RE RICHARD BIBEALT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHRN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP 68

Evidence - Employer Support - Practice and Procedure - Termination - Applicant's evidence raising possibility employees given time off work to sign termination petition - Scenario rele-

VIII

vant to voluntariness and employer support - Board ordering employer to provide union with opportunity to review and photocopy time cards for all bargaining unit employees

BERTO'S RESTAURANT INC.; RE MARJORIE MEIGHAN; RE HOTEL MOTEL AND RESTAURANT EMPLOYEES UNION, LOCAL 442.....

17

Evidence - Health and Safety - Complainant alleging dismissal for compliance with *Occupational Health and Safety Act* - Complainant striking co-worker's hand with hammer - Employer treating as "culminating incident" - Board not prepared to assess merits of discipline in previous incidents - Complainant free to lead evidence that previous discipline grieved - No evidence complainant's involvement with safety matters played any part in employers' decision to dismiss - Complaint dismissed

W.C. WOOD CO. LTD.; RE WILLIAM JAMES KERR

105

First Contract Arbitration - Employer insisting on two-tiered benefits package - Future hires in bargaining unit to receive less than longstanding benefits package enjoyed by unorganized employees - Employer position designed to send message organizing would result in loss of benefits - Position designed to penalize new hires only because union represents them - Position analogous to threatening employees with lay-off of plant shutdown for exercising rights under Act - Position uncompromising and without reasonable justification - First contract arbitration ordered

MACMILLAN BLOEDEL BUILDING MATERIALS LIMITED; RE LOCAL 2693, IWA-CANADA

58

Fraud - Certification - Practice and Procedure - Reconsideration - Allegation that employee who circulated petition was union agent with no intention to file petition or appear before Board - Allegation, if true, may constitute fraud and abuse of Board's process - Matter set down for hearing

RUSSELL H. STEWART CONSTRUCTION COMPANY LIMITED; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES.....

79

Health and Safety - Evidence - Complainant alleging dismissal for compliance with *Occupational Health and Safety Act* - Complainant striking co-worker's hand with hammer - Employer treating as "culminating incident" - Board not prepared to assess merits of discipline in previous incidents - Complainant free to lead evidence that previous discipline grieved - No evidence complainant's involvement with safety matters played any part in employers' decision to dismiss - Complaint dismissed

W.C. WOOD CO. LTD.; RE WILLIAM JAMES KERR

105

Health and Safety - Complainant alleging dismissal for exercising rights under *Occupational Health and Safety Act* - Complainant using various statutory provisions to pressure employer to shorten shift - Complainant dismissed for refusal to work assigned shift - Complaint dismissed

TORONTO TRANSIT COMMISSION WHEEL TRANS DEPARTMENT; RE EVERETTE CHAPPELLE

90

Judicial Review - Constitutional Law - Employer appealing decision of Divisional Court upholding Board's jurisdiction to issue certification order in commercial fishing industry - Federal constitutional jurisdiction over fisheries restricted to protection and preservation of fisheries as public resource - Federal constitutional jurisdiction not extending to business of commercial fishing - Labour relations of commercial fishing falling within provincial jurisdiction

over property and civil rights - Board having jurisdiction to issue certification order - Appeal dismissed

GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION AND ONTARIO LABOUR RELATIONS BOARD; RE 504578 ONTARIO LIMITED, CARRYING ON BUSINESS AS MURRAY COLLARD FISHERIES, JIM FRASER FISHERIES LTD., H. TIESSEN FISHERIES LTD., FAVIGNANA FISHING CO. LIMITED, A. FIGLIOMENI & SONS LIMITED, FOUR BROTHERS FISHING CO., 538391 ONTARIO LIMITED OPERATING AS PERALTA FOODS, CP FISHERIES LTD., FAMILY FISHERY COMPANY LTD.....

117

Judicial Review - Related Employer - Union seeking declaration that the Ontario Legal Aid Plan is a common employer with three community legal clinics - Clinics independent of OLAP but are funded by it and are accountable for the proper use of public funds - OLAP found to be engaged in related activities - Common control criteria met because OLAP influenced the management of the clinics - Board exercising discretion to make one employer declaration with respect to two clinics where OLAP had so involved itself in the affairs of the clinics that to ensure meaningful collective bargaining the union needed to be able to negotiate with OLAP - Employer seeking judicial review of decision on grounds Board ignored regulation for establishment and funding of clinics - Board finding of "intervention" in management and operation of clinics by personnel of applicant not unreasonable - Board not obliged to interpret and apply other legislation after threshold finding of "intervention" under related employer provision of *Labour Relations Act* - Board obliged to consider only labour relations aspects of clinics and not legal services aspect of their operations - Application dismissed

ONTARIO LEGAL AID PLAN, THE; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION, ONTARIO LABOUR RELATIONS BOARD, NEIGHBOURHOOD LEGAL SERVICES, INJURED WORKERS' CONSULTANTS, TENANT HOTLINE INC. AND COMMUNITY LEGAL EDUCATION ONTARIO.....

118

Natural Justice - Certification - Charter of Rights and Freedoms - Evidence - Practice and Procedure - Witness - Employee sidesperson while former MPP had objected in Legislature to provision of Act - Constitutionality of provision challenged in current proceedings - Employer alleging reasonable apprehension of bias - Board rejecting allegation - Board members appointed because of labour relations experience - Remarks made in different context nineteen years ago - Union seeking to call expert witness on content of freedom of association in European countries - Evidence analogous to legal argument about proper scope of freedom of association - Evidence not admissible in determining content of *Charter* freedom - Evidence admissible in determining whether provision reasonable limit to *Charter* freedom

PINKERTON'S OF CANADA; C.G.A.; RE RICHARD BIBEALUT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHRN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP

68

Natural Justice - Certification - Representation Vote - Employer unable to post Notice to Employees of vote result until day before time fixed for objections - Board ordering posting of decision extending time for objection

CARLETON ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE C.U.P.E.; RE GROUP OF EMPLOYEES

19

X

Petition - Certification - Construction Industry - Reconsideration - Union leading evidence showing sole petitioner had lied during evidence at certification application - Credibility critical in one-person petition - Union satisfying criteria of new evidence and due diligence - Certificate issuing	
INZOLA CONSTRUCTION (1976) LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES	53
Practice and Procedure - Adjournment - Counsel for respondent requesting adjournment on day before hearing - "Personal and business" reasons preventing respondent from retaining qualified counsel and preparing case - Request untimely and without cogent basis - Adjournment denied	
SPIDER-MAPLE LIFT LIMITED AND/OR SPIDER WASTE MANAGEMENT SERVICES AND/OR INNISFIL LANDFILL CORPORATION; RE I.U.O.E., LOCAL 793 ..	81
Practice and Procedure - Bargaining Unit - Certification - Pre-Hearing Vote - Displacement application for pre-hearing vote for unit broader than held by incumbent - Board practice in such situations to establish two voting constituencies of incumbent unit and add-on segment - Applicant union must have requisite support in each voting constituency to be entitled to a vote in each - Board directing vote in two separate constituencies	
GRANT FOREST PRODUCTS, GRANT INDUSTRIES CORP. AND GRANT FOREST PRODUCTS CORP. C.O.B. AS; RE C.P.U.; RE GRANT FOREST PRODUCTS EMPLOYEES' ASSOCIATION	45
Practice and Procedure - Certification - Charter of Rights and Freedoms - Evidence - Natural Justice - Witness - Employee sidesperson while former MPP had objected in Legislature to provision of Act - Constitutionality of provision challenged in current proceedings - Employer alleging reasonable apprehension of bias - Board rejecting allegation - Board members appointed because of labour relations experience - Remarks made in different context nineteen years ago - Union seeking to call expert witness on content of freedom of association in European countries - Evidence analogous to legal argument about proper scope of freedom of association - Evidence not admissible in determining content of <i>Charter</i> freedom - Evidence admissible in determining whether provision reasonable limit to <i>Charter</i> freedom	
PINKERTON'S OF CANADA; C.G.A.; RE RICHARD BIBEALT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHORN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP	68
Practice and Procedure - Certification - Construction Industry - Parties agreeing to removal of two names from "Schedule A" employee list - Employer later asserting these individuals should be included for purposes of count - Board not permitting parties to resile from agreement	
BEAVERBROOK ESTATES INC.; RE L.I.U.N.A., LOCAL 183	13
Practice and Procedure - Certification - Fraud - Reconsideration - Allegation that employee who circulated petition was union agent with no intention to file petition or appear before Board - Allegation, if true, may constitute fraud and abuse of Board's process - Matter set down for hearing	
RUSSELL H. STEWART CONSTRUCTION COMPANY LIMITED; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES	79

Practice and Procedure - Employee Reference - Respondent complaining to Board about Labour Relations Officer designated to inquire into employee duties and responsibilities - Practice Note 4 establishing procedure for objections - Matters not specifically covered by Practice Note to be handled by analogy - Officer having discretion over proceedings within parameters of Practice Note and Board direction - Board ruling on complaint appropriate only after receipt of Officer's report and parties' submissions	
MCINTYRE, WILF, FRED MIRON, ROLAND FRAYNE, NIELS HUSMAN, LARRY DUHAIME AND I.W.A. - CANADA, LOCAL 2693; RE PROSPER BRIZZARD, RICHARD BRIZZARD, ROBERT CASSON, RICHARD KOSKI, DAVID JAGGARD, MANFRED KRAUSE, ROBERT KRAUSE, DAVID ROSS, AULIUS TIITTO, DARRELL WESTOVER, RAYNARD JACOBSON, BRUCE NORDSTROM AND LARRY JAGGARD; RE GRAVEL AND LAKE SERVICES LIMITED	64
Practice and Procedure - Employer Support - Evidence - Termination - Applicant's evidence raising possibility employees given time off work to sign termination petition - Scenario relevant to voluntariness and employer support - Board ordering employer to provide union with opportunity to review and photocopy time cards for all bargaining unit employees	
BERTO'S RESTAURANT INC.; RE MARJORIE MEIGHAN; RE HOTEL MOTEL AND RESTAURANT EMPLOYEES UNION, LOCAL 442.....	17
Pre-Hearing Vote - Bargaining Unit - Certification - Practice and Procedure - Displacement application for pre-hearing vote for unit broader than held by incumbent - Board practice in such situations to establish two voting constituencies of incumbent unit and add-on segment - Applicant union must have requisite support in each voting constituency to be entitled to a vote in each - Board directing vote in two separate constituencies	
GRANT FOREST PRODUCTS, GRANT INDUSTRIES CORP. AND GRANT FOREST PRODUCTS CORP. C.O.B. AS; RE C.P.U.; RE GRANT FOREST PRODUCTS EMPLOYEES' ASSOCIATION	45
Reconsideration - Certification - Construction Industry - Petition - Union leading evidence showing sole petitioner had lied during evidence at certification application - Credibility critical in one-person petition - Union satisfying criteria of new evidence and due diligence - Certificate issuing	
INZOLA CONSTRUCTION (1976) LIMITED; RE L.I.U.N.A, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES	53
Reconsideration - Certification - Fraud - Practice and Procedure - Allegation that employee who circulated petition was union agent with no intention to file petition or appear before Board - Allegation, if true, may constitute fraud and abuse of Board's process - Matter set down for hearing	
RUSSELL H. STEWART CONSTRUCTION COMPANY LIMITED; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES.....	79
Related Employer - Bargaining Unit - Certification - Construction Industry - Labourers' union seeking certification under provincial ICI sector provisions for employees of related employer - Bricklayers' union already holding bargaining rights for bricklayers' assistants with related employer- Labourers' seeking bargaining unit description excluding bricklayers' assistants for whom other union holds bargaining rights - Certificate issuing	
GOTTCO CONTRACTORS LIMITED, GOTTARDO PROPERTIES LIMITED, GOTTARDO CONTRACTING (1980) INC., GOTTARDO CONTRACTING CO. LIMITED, GOTTARDO HOLDINGS COMPANY LTD., GOTTARDO MANAGEMENT LIMITED, AND GOTTARDO CORPORATION; RE L.I.U.N.A., LOCAL 506; RE B.M.I.U., LOCAL 1.....	25

XII

Related Employer - Judicial Review - Union seeking declaration that the Ontario Legal Aid Plan is a common employer with three community legal clinics - Clinics independent of OLAP but are funded by it and are accountable for the proper use of public funds - OLAP found to be engaged in related activities - Common control criteria met because OLAP influenced the management of the clinics - Board exercising discretion to make one employer declaration with respect to two clinics where OLAP had so involved itself in the affairs of the clinics that to ensure meaningful collective bargaining the union needed to be able to negotiate with OLAP - Employer seeking judicial review of decision on grounds Board ignored regulation for establishment and funding of clinics - Board finding of "intervention" in management and operation of clinics by personnel of applicant not unreasonable - Board not obliged to interpret and apply other legislation after threshold finding of "intervention" under related employer provision of <i>Labour Relations Act</i> - Board obliged to consider only labour relations aspects of clinics and not legal services aspect of their operations - Application dismissed	
ONTARIO LEGAL AID PLAN, THE; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION, ONTARIO LABOUR RELATIONS BOARD, NEIGHBOURHOOD LEGAL SERVICES, INJURED WORKERS' CONSULTANTS, TENANT HOTLINE INC. AND COMMUNITY LEGAL EDUCATION ONTARIO.....	118
Representation Vote - Certification - Natural Justice - Employer unable to post Notice to Employees of vote result until day before time fixed for objections - Board ordering posting of decision extending time for objection	
CARLETON ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE C.U.P.E.; RE GROUP OF EMPLOYEES	19
Termination - Employer Support - Evidence - Practice and Procedure - Applicant's evidence raising possibility employees given time off work to sign termination petition - Scenario relevant to voluntariness and employer support - Board ordering employer to provide union with opportunity to review and photocopy time cards for all bargaining unit employees	
BERTO'S RESTAURANT INC.; RE MARJORIE MEIGHAN; RE HOTEL MOTEL AND RESTAURANT EMPLOYEES UNION, LOCAL 442.....	17
Termination - Timeliness - Collective agreement with retroactive duration clause executed after otherwise timely termination application cannot bar application	
PALMERSTON, TOWN OF; RE ROBERT A. WALLACE; RE U.F.C.W., LOCAL 175	65
Termination - Timeliness - Termination application timely only if brought after latest-occurring of statutory scenarios - Twelve months not having elapsed from appointment of conciliation officer - Appointment untimely	
TEAMSTERS CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 91; RE CLARENCE EDWIN MUIR; RE ACKLANDS LIMITED BY UNI-SELECT INC.	89
Timeliness - Termination - Collective agreement with retroactive duration clause executed after otherwise timely termination application cannot bar application	
PALMERSTON, TOWN OF; RE ROBERT A. WALLACE; RE U.F.C.W., LOCAL 175	65
Timeliness - Termination - Termination application timely only if brought after latest-occurring of statutory scenarios - Twelve months not having elapsed from appointment of conciliation officer - Appointment untimely	
TEAMSTERS CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 91; RE CLARENCE EDWIN MUIR; RE ACKLANDS LIMITED BY UNI-SELECT INC.	89

Trade Union Status - Certification - Applicant citing recognition as employee organization by Ontario Public Service Labour Relations Tribunal - Trade union status question of fact in each case - Board having regard for applicant's history as bargaining agent for Crown employees - Applicant fitting statutory definition	
VAUGHAN, THE CORPORATION OF THE TOWN OF, AND TOKMAKJIAN LIMITED; RE A.T.U., LOCAL 1587; RE GROUP OF EMPLOYEES.....	102
Union Successor Status - Bargaining Unit - Board having no jurisdiction to amend bargaining unit description - Board jurisdiction confined to declaration of successor status with all rights, privileges, and duties of predecessor, or dismissal of application - Carving out of separate unit for technicians inappropriate in any event since objections unrelated to union merger - Declaration of union successor status issuing	
HAMILTON-WENTWORTH ROMAN CATHOLIC SEPARATE SCHOOL BOARD PROFESSIONAL STAFF ASSOCIATION, THE; RE C.U.P.E.; RE GROUP OF EMPLOYEES.....	49
Witness - Certification - Charter of Rights and Freedoms - Evidence - Natural Justice - Practice and Procedure - Employee sidesperson while former MPP had objected in Legislature to provision of Act - Constitutionality of provision challenged in current proceedings - Employer alleging reasonable apprehension of bias - Board rejecting allegation - Board members appointed because of labour relations experience - Remarks made in different context nineteen years ago - Union seeking to call expert witness on content of freedom of association in European countries - Evidence analogous to legal argument about proper scope of freedom of association - Evidence not admissible in determining content of <i>Charter</i> freedom - Evidence admissible in determining whether provision reasonable limit to <i>Charter</i> freedom	
PINKERTON'S OF CANADA; C.G.A.; RE RICHARD BIBEALT; RE INCO LIMITED; RE ATTORNEY-GENERAL OF ONTARIO; RE NATIONAL PROTECTIVE SERVICES COMPANY LIMITED; RE GEORGE FAULKENBURG; RE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO; RE INTERNATIONAL UNION UNITED PLANT GUARDS, LOCAL 1962; RE RON SAXTON; RE BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE GORDON A. SOUTHORN; RE WACKENHUT OF CANADA LIMITED; RE SHANE FREEMAN; RE U.S.W.A.; RE LARRY BISHOP	68

2437-88-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Atcost Soil Drilling Inc.**, Respondent v. International Union of Operating Engineers, Local 793, Intervener v. Group of Employees, Objectors

Certification - Construction Industry - Employer engaged in drilling to obtain rock and soil samples for engineering firms - Engineering firms using samples to determine appropriateness of area for future construction - Time lag of up to 10 years between drilling and commencement of actual construction work - Employer not engaged in construction industry

BEFORE: *Ian C. Springate*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Kurchak*.

APPEARANCES: *L. A. Richmond*, *T. Connolly* and *L. D'Agostini* for the applicant; *J. Tascona* and *S. Sukunda* for the respondent; *J. J. Slaughter* and *Mike Gallagher* for the intervener and employee objectors.

DECISION OF THE BOARD; December 29, 1989

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*. The applicant is seeking to be certified to represent a bargaining unit comprised of construction labourers employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario as well as those employed in all other sectors within the Board's geographic area No. 8.
2. On April 8, 1988 the Board certified the intervener for a bargaining unit comprised of all employees of the respondent working at and out of Concord, subject to certain exceptions not relevant to these proceedings. The intervener's application for certification was filed pursuant to the general rather than the construction industry provisions of the Act. On December 15, 1988 the Board directed that a first collective agreement be settled by arbitration. A collective agreement between the respondent and the intervener was imposed by the Board on January 18, 1989. The instant application was filed on January 5, 1989.
3. The intervener raises its bargaining rights as a bar to the instant application. The applicant and the respondent contend that those bargaining rights are not a bar. They submit that the respondent is an employer in the construction industry and that the certificate issued to the intervener cannot bar a construction industry certification application. The applicant further contends that by force of section 144 of the Act, the intervener is barred from representing employees of the respondent in the industrial, commercial and institutional sector of the construction industry. At the hearing the Board ruled that the appropriate starting point for dealing with this application would be to determine whether or not the respondent is an employer in the construction industry.
4. The evidence indicates that the respondent was engaged in the same general type of work when both the intervener and the applicant filed their applications for certification. During the initial certification proceedings the respondent did not contend that the intervener's application should have been made under the construction industry provisions of the Act. During the first contract proceedings the respondent expressly contended that it was not engaged in the construction industry.
5. The respondent is based in the community of Concord in the Town of Vaughan. It primarily performs drilling operations for the purpose of obtaining soil and rock samples. It is gener-

ally engaged to perform this work by consulting engineering firms. A consulting engineering firm will ask the respondent to send a crew to a particular location where either an engineer or a technologist with the engineering firm will instruct them where to dig. Employees of the respondent will then use drilling equipment to drill a hole and lift out samples. The samples are provided to the engineering firm to assess. Recently the respondent has not done any work for the Ministry of Transportation. From 1984 to 1987, however, some 20 per cent of the company's work was done for the Ministry. The main difference with this work was that the Ministry had its own engineers on staff and accordingly no consulting engineering firm was involved.

6. Soil and rock samples are generally taken to enable an engineering firm to ascertain the appropriateness of the area in question for the future construction of a building, road, bridge hydro tower and/or to determine the type of foundation which will be required. Apart from employees of the respondent and representatives of an engineering firm, generally no one else is present when a soil sample is taken. Mr. Stan Sukunda, the president of the respondent, indicated that the respondent is not advised as to why the company is being asked to take a particular soil or rock sample. He further testified that construction work might take place anywhere from one month to ten years later. At one point in his evidence Mr. Sukunda indicated that it was possible that based on a soil sample no construction would take place. Subsequently, however, he indicated that he would not be in a position to know about such a decision.

7. Between 20 and 30 per cent of the respondent's business results from being retained by hydrogeology firms to install a pipe in the ground so that the hydrogeology firm can make certain determinations with respect to the local water table. In the past the respondent has also installed pipes at and around dump sites so as to allow officials to check for the possible build up of gas.

8. Soil samples are obtained by the respondent using the same equipment employed by construction firms to do horizontal boring. The drilling for rock samples is similar to the work done by construction employees when blasting rock. The drilling by these construction employees, however, is not done to obtain rock samples but to make holes into which an explosive can be inserted.

9. During his examination in chief Mr. Sukunda testified that some 65 per cent of the respondent's work is related to future subdivisions, 20 per cent is for hydrogeology purposes and 15 per cent is on Ontario Hydro sites. Mr. Sukunda was subsequently cross-examined about the 65 per cent figure relating to subdivisions. At that point Mr. Sukunda stated that he did not know what work performed by the respondent was related to subdivisions. Mr. Sukunda added that he works for consulting engineering firms and does not know if the work relates to a future subdivision, a big building, a sewer or a road.

10. Mr. Sukunda testified that if a problem develops with a building under construction, the respondent might be called onto an actual construction site to take a soil sample. This is done so that a determination can be made as to whether the engineer or a contractor was at fault. Mr. Sukunda indicated that this type of situation does not occur very often. Mr. Sukunda also noted that on one occasion when some cracks had occurred in a generating plant, the respondent was called in to take soil samples so that tests could be done to ascertain the cause of the cracks.

11. It was the evidence of Mr. Tom Connolly, senior assistant manager for the Labourers Ontario District Council, that on Ontario Hydro sites soil sampling has been performed by construction labourers under the Electrical Power System Construction Association ("EPSCA") collective agreement. Mr. Sukunda indicated that on Ontario Hydro sites the respondent generally uses its own employees but pays them the EPSCA rate for construction labourers. He added that on one occasion he had hired a single labourer through a Labourers Union hiring hall.

12. Section 1(1)(f) of the *Labour Relations Act* defines the construction industry as follows:

1.-(1) In this Act,

- (f) "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof;

13. In support of its contention that the work performed by the respondent is work in the construction industry, the applicant relies on the Board's decision in *Stone & Webster Canada Limited*, [1987] OLRB Rep. April 607. In that case the Board concluded that certain employees engaged in surveying work were employed in the construction industry. It appears that the employees in question were employed on an actual construction project checking concrete pours and the placements of anchor bolts, inserts and conduits. In its decision the Board noted that another union had been certified to represent employees of general surveying companies under the general provisions of the Act. For its part the intervener relies on the Board's decision in *Ethier Sand & Gravel Limited*, [1979] OLRB Rep. Oct. 962 where the Board held that the supplying of sand and gravel to construction sites does not fall within the construction industry.

14. The work performed by the respondent is generally not done in connection with an ongoing construction project. Presumably at times construction projects tentatively planned for a particular area will not be built, at least at that location, because of the results of soil, rock or hydrogeology tests. If construction does eventually go ahead, it is possible that the results of the tests might determine what type of construction will take place. Actual construction work might not occur for up to 10 years after a sample has been taken. In our view, the work performed by the respondent takes place well prior to the construction process and the respondent cannot reasonably be viewed as being engaged in a business in the construction industry.

15. It follows from this conclusion that the instant application should not have been brought under the construction industry provisions of the Act. As a general practice the Board will permit a construction industry certification application to be turned into a regular application for certification. No useful purpose would be achieved by doing so in the instant case, however, since any regular application for certification would clearly have been out of time due to the intervener's bargaining rights. In the result, this application is hereby dismissed.

2848-88-EP Vinod Mohindra, Complainant v. **Bakelite Thermosets Limited**,
Respondent

Environmental Protection Act - Employee terminated for acting in compliance with, or seeking enforcement of, *Environmental Protection Act* - Employee not seeking reinstatement - Appropriate measure of damages actual loss and not notice period under *Employment Standards Act*

BEFORE: Robert Herman, Vice-Chair, and Board Members W. A. Correll and C. McDonald.

APPEARANCES: David Harris for the complainant; Leonard Ricchetti and Hilary Clarke for the respondent.

DECISION OF THE BOARD; January 29, 1990

1. The complainant Vinod Mohindra was an employee of the respondent Bakelite Thermosets Limited until June of 1988, at which time he asserts he was discharged in contravention of section 134b(2) of the *Environmental Protection Act* (also referred to as the "Act"). He does not seek reinstatement by way of remedy, but only compensation.

2. At the conclusion of the hearing the Board orally ruled that the company had breached the Act. We now provide our reasons for that decision.

3. Section 134b of the *Environmental Protection Act* reads as follows:

134b.-(1) In this section, "Board" means the Ontario Labour Relations Board.

(2) No employer shall,

- (a) dismiss an employee;
- (b) discipline an employee;
- (c) penalize an employee; or
- (d) coerce or intimidate or attempt to coerce or intimidate an employee,

because the employee has complied or may comply with,

- (e) the *Environmental Assessment Act*;
- (f) the *Environmental Protection Act*;
- (g) the *Fisheries Act* (Canada);
- (h) the *Ontario Water Resources Act*; or
- (i) the *Pesticides Act*.

or a regulation under one of those Acts or an order, term or condition, certificate of approval, licence, permit or direction under one of those Acts or because the employee has sought or may seek the enforcement of one of those Acts or a regulation under one of those Acts or has given or may give information to the Ministry or a provincial officer or has been or may be called upon to testify in a proceeding related to one of those acts or a regulation under one of those Acts.

(3) A person complaining of a contravention of subsection (2) may file the complaint in writing with the Board.

(4) Where a complaint is filed in writing with the Board,

- (a) the Board may authorize a labour relations officer to inquire into the complaint; or
- (b) the Board may inquire into the complaint.

(5) A labour relations officer who is authorized to inquire into the complaint shall make his inquiry forthwith and shall endeavour to effect a settlement of the matter complained of and shall report the results of his inquiry and endeavours to the Board.

(6) Where the labour relations officer is unable to effect a settlement of the matter complained of, the Board may inquire into the complaint.

(7) Where the Board inquires into the complaint and is satisfied that an employer has contravened subsection (2), the Board shall determine what, if anything, the employer shall do or refrain from doing with respect thereto.

(8) A determination under subsection (7) may include, but is not limited to, one or more of,

- (a) an order directing the employer to cease doing the act or acts complained of;
- (b) an order directing the employer to rectify the act or acts complained of; or
- (c) an order directing the employer to reinstate in employment the complainant, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer.

(9) A determination by the Board under subsection (7) applies notwithstanding a provision of an agreement.

(10) On an inquiry under this section, the burden of proof that an employer did not contravene subsection (2) lies upon the employer.

(11) Where there is a failure to comply with a term of the determination made under subsection (7), the complainant, after the expiration of fourteen days from the date of the release of the determination by the Board or from the date provided in the determination for compliance, whichever is later, may notify the Board in writing of the failure.

(12) Where the Board receives notice in accordance with subsection (11), the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons therefor, if any, and the determination shall be entered in the same way as a judgment or order of the court and is enforceable as such.

(13) Where the matter complained of has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed, the settlement is binding and shall be complied with according to its terms, and a complaint that a settlement has not been complied with shall be deemed to be a complaint under subsection (3).

(14) The *Labour Relations Act* and the regulations under that Act apply with necessary modifications in respect of a proceeding under subsections (2) to (13).

(15) For the purposes of subsections (2) to (14), an act mentioned in subsection (2) that is performed on behalf of an employer shall be deemed to be the act of the employer. 1983, c.52, s. 22.

4. In making our findings of fact, we have preferred the evidence of the complainant, Mohindra, where it conflicts with the evidence of the two witnesses called by the company, John Hadden and Bill Churchward. Having observed all three in the witness stand, we are satisfied that Mohindra's evidence was more credible. The testimony of both Hadden and Churchward was given in a somewhat evasive manner, was internally inconsistent, and was inconsistent in some respects with each other's version of what had occurred. For example, Hadden testified that the decision to terminate Mohindra was made solely by him and Churchward. In contrast, Churchward testified the decision was made in addition with the assistance of legal counsel and the President of the respondent, Clive Marsden. We also note that a number of areas of conflict between the testimony of Churchward and Mohindra involved evidence with respect to what each claimed had occurred at various meetings which they attended. The company did not call to testify any of the other company officials identified by both Churchward and Mohindra as having participated in those meetings. Having found Mohindra more credible a witness, we accept his version of events.

5. Mohindra had been an employee of the company, or its predecessor, since approximately November 1975. At the relevant time he was employed as an environmental technologist. His duties and responsibilities included liaison with the provincial Ministry of the Environment, the monitoring of air, water and ground facilities of the respondent, and the monitoring of effluents. Mohindra was also responsible for reporting as necessary information to the Ministry of the Environment; for example, the reporting of any spills or inappropriate emissions from the plant, and the reporting with respect to the company's environmental projects, if any.

6. Mohindra had clearly been unhappy working for the respondent for some period of time, and had been trying to obtain other employment since approximately 1987. Part of that unhappiness stemmed from his feelings that he had not been properly treated at work, and part stemmed from the fact that his family had moved from Belleville, where the plant was located, to Toronto in November, 1987. Mohindra was taking steps to join his family and in February, 1988, he listed his house for sale. On April 12, he sold the house, with a closing date of June 30, 1988.

7. Insofar as this complaint is concerned, the critical events at work began on March 31, 1988. On that date, officials of the Ministry of the Environment showed up unannounced at the plant with a search warrant, and searched the respondent's premises, removing documents from the offices of several employees, including Mohindra's. The next day, April 1, 1988, a strategy meeting was convened at the instigation of the Plant Manager, Bill Churchward. In addition to Mohindra and Churchward, also present at this meeting were Bruce Carter, the Production Manager, Bob Simco, the Distribution Manager, Paul Green, the Accounting Manager, Bruce Clark, and two legal counsel (not counsel who appeared in these proceedings). During the discussion of the Ministry of the Environment's investigation and the company response, Mohindra advised those present that he had in the past falsified reports to the Ministry and that he had done so with the blessing and knowledge of his superiors at the time. Mohindra made clear that his superiors had been aware of what he was doing. Churchward responded that he had not previously been aware of that allegation. Mohindra in turn replied that to the contrary he had kept Churchward informed. Churchward advised those at the meeting to go through their documents and make a list of them. He also advised Mohindra to remove sensitive documents from his file cabinets and to destroy them. Mohindra told Churchward that he was reluctant to do so, as the Ministry of the Environment officials had made a list the previous day of the documents in his possession.

8. Shortly thereafter the meeting broke up and Mohindra went back to his office, to begin going through his files. When Mohindra's wife phoned to say she needed the car, Mohindra went to Churchward and advised him of this request and that he had to leave. Churchward told Mohindra that he had better protect himself and therefore ought to return right afterwards and continue working on his files. Mohindra again told Churchward that what he had done had been with the full knowledge of his superiors.

9. After taking his car home, Mohindra returned to the plant, and continued cleaning up of his office and going through his files. Instead of destroying the files however, Mohindra secreted them on his person and took them home. He did not advise Churchward he was doing this.

10. Three days later, on April 4, 1988, Churchward and the complainant were involved in investigating some foam residue which had been found at a particular location on site. The two of them disagreed on the appropriateness of reporting this event to the Ministry of the Environment. Churchward ultimately told the complainant not to report the incident. That same day, Mohindra advised Ron Carter that he had removed sensitive documents from his office on April 1st, and had taken them to his residence. Ron Carter was the Manager of Environmental Affairs for the parent

company of the respondent. It was part of Mohindra's duties and responsibilities to send carbon copies to Carter of all his correspondence with respect to his environmental duties.

11. On April 5, 1988, along with other employees of the company, Mohindra and the Ministry of the Environment officials met in Kingston. On April 11 or 12, 1988, Churchward attended at Mohindra's office and advised him to destroy some sensitive environmental documents. On April 13, 1988, another incident occurred of effluent being observed where it ought not to have been, and again Mohindra wanted to report the incident to the Ministry of the Environment. Churchward told him not to file a report.

12. On April 19 and 20, two inspectors from the Ministry of the Environment attended at the complainant's house and had an "off the record" discussion with Mohindra about environmental affairs at the respondent. The meeting ended with an arrangement to meet again the following week. This subsequent meeting never took place.

13. That same day, April 20, Churchward and the complainant had another meeting. Churchward told Mohindra not to maintain log books, a type of written record which the complainant would ordinarily have maintained.

14. At this stage, Mohindra was becoming concerned about his prior falsification of records. The impression he was gaining was that the company, who had been aware of such incidents, was now going to abandon him and refuse to support him. Mohindra accordingly retained his own legal counsel. On April 28, Churchward called Mohindra into his office, and again instructed the complainant not to write out sensitive memos or fill in sensitive information in the log books.

15. On May 2, John Hadden started work for the respondent as the new Plant Engineer. As Plant Engineer, Hadden was Mohindra's immediate supervisor, and in turn was supervised by Churchward. Hadden's responsibilities included the environmental affairs of the respondent. Hadden met Mohindra on his first day, May 2nd. That same day Mohindra received, directly or through his legal counsel, a letter from counsel in the Legal Services Branch of the Ministry of the Environment indicating that the Ministry was undertaking that Mohindra would not be prosecuted for any offences under the *Environmental Protection Act* and/or the *Ontario Water Resources Act* with respect to his employment with the respondent. This undertaking was given on condition that Mohindra's statements were both true and fully disclosed all the relevant facts of which he was aware, and that he further co-operated fully with the Ministry in its investigation into and prosecution of alleged offences committed by the respondent.

16. That day was the last day the complainant worked for the respondent. The following day, May 3, the complainant did not show up for work, advising the employer that he was suffering from a bad back and was unable to work. Mohindra spoke to Hadden on May 4th, and told him that he was also suffering from tension, which in turn was causing headaches and backaches. Hadden was advised that the complainant would likely be off work for a couple of weeks.

17. On May 15, 1988, Mohindra met with Ron Carter (the Manager of Environmental Affairs for the parent company) and told Carter of the events that had transpired, including the Ministry of the Environment search on March 31, the meetings and interactions with Churchward on April 1st, 4th, 5th, and so forth. He told Carter that he was confused, anxious, and unable to sleep. He also told Carter that he was at that point desperate and considered himself somewhat divorced from the company.

18. The following day, May 16, Carter phoned Mohindra and asked Mohindra to meet with him and his lawyer in order to discuss events. A meeting was suggested for May 18, but in the

interim Mohindra spoke to his counsel who advised that he not attend. The meeting therefore never occurred.

19. On June 2nd, 1988, Hadden phoned Mohindra and told him that the company had arranged for an appointment for Mohindra to be examined by the company's doctor, Dr. Sherlock, on the following day. Mohindra did not attend that examination, as his counsel advised Mohindra to first see his own doctor. A subsequent appointment was arranged for June 10 for Dr. Sherlock to examine Mohindra, and Mohindra was in fact examined on that day.

20. On June 13, 1988, Mohindra was sent a letter by counsel from the same law firm as the lawyer acting for Ron Carter (as discussed in paragraph 18 above). Mohindra was still off work on sick leave. It reminded Mohindra of the confidentiality agreement he had agreed to when he began employment, and further reminded him that as part of his obligations, "[he] should return forthwith any materials or documents belonging to the company in [his] possession. If [he] would like to arrange for the return of such materials or documents, please contact the writer." There was no evidence before the Board as to who caused this letter to be sent or why it was sent.

21. In a letter dated June 15, 1988, two days later, Hadden wrote to Mohindra advising him that he was required to return to work by Monday, June 20, 1988. The letter noted that the company had consulted with Dr. Sherlock and it was the company's opinion that Mohindra could resume his job in a limited capacity, working at a desk and minimizing strain to his back. On June 17, 1988, Mohindra saw another doctor with respect to his problems.

22. On June 20, Mohindra did not return to work, as demanded by Hadden's letter of June 15. Hadden and Churchward, together with the input and assistance of Marsden, President of the company, and legal counsel, decided to terminate the employment of Mohindra, on the grounds of failure to return to work as required. No other grounds were given or relied upon by the company as justifying the discharge. The company was well aware when it made this decision of the Ministry of the Environment's investigation. Churchward testified that Mohindra's interaction with this investigation had nothing to do with the company's decision to consult the company's President and legal counsel over whether to discharge Mohindra.

23. While the decision was taken on June 20 to terminate Mohindra, no termination letter was either drawn up or sent to him, nor was the decision communicated to him. Shortly after the termination decision was made, the company received a letter from Mohindra, dated June 17, 1988, enclosing a further medical certificate from his family physician, indicating that he was suffering from anxiety and depression and remained unable to work. Churchward discussed this letter with Marsden, Hadden, and legal counsel. Both Hadden and Churchward testified that they believed this new medical report and its contents. Nevertheless, they testified they each felt that Mohindra was simply raising another excuse for not coming to work.

24. On June 23, Mohindra saw a psychiatrist, and the psychiatrist's medical opinion indicating that Mohindra could not work was forwarded to the company doctor, Dr. Sherlock, on June 28, 1988.

25. The letter of termination, signed by Hadden, was finally drawn up on July 4, 1988, indicating that Mohindra had been fired as of June 20, and stating that "this action is necessary as you did not report for work on June 20, 1988 as directed. Please be advised that all secrecy and confidentiality [sic] agreement signed by you are in effect and that these agreements do not allow you to remove confidential information from company premises or to disclose confidential information to third parties." Hadden's secretary did not mail the letter. Instead, she simply placed it in Mohindra's mail slot at the plant, notwithstanding that he had been off on sick leave since May 2, 1988.

and notwithstanding that the letter was a letter of termination because he had failed to return to work. The company also filled out a Record of Employment dated July 7, 1988, for Employment and Immigration Canada, in which it indicated, as the reason for issuing the Record, "Failed to return to work when requested".

26. During this period, Mohindra continued to look for work with other employers. He had obtained letters of reference from the company to assist him with his search. He remained unaware of his termination.

27. In a letter dated July 21, 1988, Mohindra's lawyer wrote to Hadden advising him that Mohindra had not received his pay cheque for the most recent pay period. It was through this letter that Hadden and the company realized that the July 4 termination letter had not been received by the complainant. Hadden immediately caused the July 4 termination letter to be forwarded to Mohindra. Mohindra received it on July 26, 1988. The letter went out as originally written and it remained dated July 4, 1988. Receipt of this letter on July 26 was the first knowledge the complainant had or could have had of his termination.

28. The following week, in a letter dated August 3, 1988, counsel for Mohindra wrote to counsel for the company indicating the complainant's dissatisfaction with his termination and advising the company that legal action might be taken. In response, in a letter dated August 12, 1988, counsel for the company wrote to Mohindra's counsel denying that Mohindra had been terminated as a result of responding to inquiries from the Ministry of the Environment. Counsel wrote that "Mr. Mohindra breached his confidentiality agreement by providing a number of Bakelite's documents to the Ministry of the Environment and that in itself was sufficient cause for dismissal. In any event, Mr. Mohindra's failure to return to work to undertake light duties was also sufficient cause for his termination."

29. On August 22, 1988, Mohindra obtained alternative employment.

30. Our inquiry under section 134b of the *Environmental Protection Act* focuses on the reasons for Mohindra's discharge. In this sense it is not dissimilar from the Board's inquiry pursuant to section 24(1) of the *Occupational Health and Safety Act*. The issue that the Board must decide is why Mohindra was discharged by the respondent. If we are satisfied that any part of the reason for his discharge was for an impermissible reason as set out in section 134b(2) of the *Environmental Protection Act*, then the employer will have breached the Act. As the Board wrote in *Commonwealth Construction Company* [1987] OLRB Rep. July 961 in discussing its inquiry under the *Occupational Health and Safety Act*:

21. The issue we must decide is why the complainants were discharged. This turns on our finding of the facts, based on our assessment of the evidence and whether we believe the company's claim that it discharged them because they wouldn't perform their work, or the complainants' claim that they *were* performing their work and never took company time for their pursuits, and were discharged because they raised safety matters. Put in terms of the statutory language, were the complainants discharged *because* they acted in compliance with the Act or *because* they sought its enforcement? It is important to understand that what is protected by the Act is the right of employees not to be threatened or disciplined *because* of their acting in compliance with the Act (or regulations etc.) or seeking its enforcement. An employee might engage in conduct warranting discipline, and in those circumstances an employer can impose discipline, provided the discipline is not motivated even in part by a concern that the employee was acting in compliance with or seeking to enforce the Act. Discipline levied for that reason is proscribed by section 24(1). Whether a breach is found will depend on whether the Board concludes that the disciplinary response was even partially prompted because the employee was seeking to exercise his or her rights under the Act. In this respect, the Board's inquiry under section 24 of the Act

parallels the nature of the inquiry under section 89 of the *Labour Relations Act*. As the Board noted in *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577:

44. We now turn to the unfair labour practice provisions underlying this complaint and to a consideration of the law as it relates to the degree of anti union motive necessary to establish such violations of the Act. For the purpose of our analysis it is useful to distinguish between decisions affecting individual employees and major business decisions having potentially broader impact. In dealing with the treatment of individual employees this Board has consistently held that if only one of the reasons for an employer's actions against an employee (discharge, layoff, transfer, demotion, etc.) is related to union activity the action is in contravention of the Act. Given the reverse legal onus mandated by section 79 (4a) the Board has held that to find there has been no violation of the Act in these kinds of cases it must be satisfied that the employer's actions were not in any way motivated by anti-union sentiment. The Board summarized this approach and the effect of the statutory reversal of the legal burden of proof in *The Barrie Examiner* case, [1975] OLRB Rep. Oct. 745 as follows:

...the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct.

This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

(See also *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 294 and *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299.) Judicial support for this application of the law is found in *Regina v. Bushnell Communications et al* (1973), 1 O.R. (2d) 422 wherein the Ontario High court overturned a lower court decision which had dismissed a complaint under section 110(3) of the *Canada Labour Code*, which is identical in all material respects to section 58 of *The Labour Relations Act*, on the grounds that membership in a union was not established as the 'principal reason' for the termination of employment. The High Court held:

In considering an enactment devoid of the words 'sole reason' or 'for the reason only' applied to the act of dismissal and resting only on the word 'because', the Court must take an expanded view of its application. If the evidence satisfies it beyond a reasonable doubt that membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason or one incidental to it, or as one of many reasons regardless of priority, s. 110(3) of the *Canada Labour Code* has been transgressed.

The decision of the High Court was upheld on appeal by the Court of Appeal (4 O.R. (2d) 288) and was cited with approval by the Federal Court in *Sheehan and Upper Lakes Shipping Limited et al* (1977), 81 D.L.R. (3d) 208. In this jurisdiction, therefore, the Board, with judicial support, applies a 'taint theory' in dealing with alleged unlawful treatment of individual employees. If an employer's actions impact against employees and the motives underlying the employer's action are in any way tainted by an anti-union animus the employer is in violation of the Act.

The same sorts of considerations and analysis apply in our view to alleged violations of Section 24 of the *Occupational Health and Safety Act*. If the respondent has convinced us that no part of the reason for the discharges was concern over the complainants' seeking enforcement of the Act or acting in compliance with it, then the respondent will not have violated section 24 of the Act.

31. There are of course differences between these pieces of legislation but under each of them the approach the Board takes is to assess whether any part of the motivation for the discharge was for an impermissible reason as set out in the statute. Under this Act, as under the *Occupational Health and Safety Act* or the *Labour Relations Act*, the burden of proof is upon the employer (see section 134b(10)).

32. We conclude that Mohindra was absent from work not only because of his back problems and state of anxiety, but in part as well because of his unhappiness at working under the direction of Churchward. But this conclusion does not mean that the company was not in breach of the Act. The question we must answer is not whether Mohindra was entitled to have been absent from work for the only reasons he claimed to be so entitled (his state of health). Rather, we must ascertain whether the company discharged Mohindra solely for the reasons it claims to have discharged him, his failure to return to work on June 20, 1988, or whether one of its reasons for the discharge was contrary to section 134b(2). To return to the statutory language, was he discharged *because* he, for example, provided information to the Ministry. On this question, we conclude that the company's reasons for discharging Mohindra were not truly related to his failure to return to work. We conclude he was discharged because he was either acting in compliance with or seeking the enforcement of the *Environmental Protection Act*, or because he was providing information to the Ministry of the Environment. Termination for any of these reasons is a breach of the Act.

33. The company maintains that the sole reason it terminated Mohindra was his failure to return to work, in a limited capacity, on June 20, by which time the company felt Mohindra could have performed light duties. Only the decision to terminate Mohindra was made on June 20. Mohindra was not notified of the decision on June 20. No termination letter was drawn up until July 4, 1988 and the Record of Employment was not drawn up until July 7, 1988. By these dates the company was in possession of several additional pieces of medical information, including the June 17, 1988, medical certificate from Mohindra's family physician and the June 28 medical letter from the psychiatrist who had examined Mr. Mohindra. Both those letters indicated that Mohindra remained unable to work, contrary to the view held by the company on June 20.

34. Notwithstanding that the company had before it this new medical information, it made no attempt to contact Mohindra to discuss the additional medical information nor to ask him whether he was still unable to work. Instead, the company chose to maintain its decision of June 20, discharging him because he had failed to return to work when it felt he was medically able to work in a limited capacity, based upon information which the company itself was aware was probably no longer accurate.

35. The company claims that Mohindra's environmental activities formed no part of its decision to terminate Mohindra on June 20, 1988 for failure to return to work. If so, it is difficult to understand why company counsel wrote to Mohindra the week before, when he had already been off on sick leave for almost 6 weeks, reminding Mohindra of his obligation to maintain the confidentiality of the company's information, and advising him that he should return forthwith to the company any materials or documents belonging to the company in his possession. It will be recalled that the Manager of Environmental Affairs, Ron Carter, had been told by Mohindra on April 4, 1988, that Mohindra had removed sensitive documents from his office at work and was retaining them at his residence. It was company counsel, from the law firm retained by Carter, who wrote this June 13th letter to Mohindra. It will also be recalled that Mohindra met with Ron Carter on May 15, 1988, and relayed to him a complete recital of the events that had occurred, including Mohindra's interaction with Churchward and Mohindra's role in the environmental problems. And Marsden, the President of the company, was consulted on June 20 over whether Mohindra should be terminated. The Board did not have the benefit of Marsden's evidence, but we conclude that he

participated in the decision because of concern over Mohindra's environmental activities. It is clear that the company was concerned with Mohindra's interaction with the Ministry of the Environment and the information contained in his files, which the company knew Mohindra had stored at his residence.

36. It was concerned also with the approach that Mohindra took to reporting incidents and information to the Ministry, an approach different than was taken by his superior Churchward. The company saw an opportunity (it thought) on June 20th to discharge Mohindra, since it could maintain that as of June 20th it had sufficient legal grounds to discharge him. Although the company was apprised, before it notified Mohindra of the termination, that Mohindra did in fact have valid medical reasons for continuing his absence, it nevertheless reaffirmed its decision to terminate him and it communicated that decision to him. At the time it did so, it was either fully aware that it had been mistaken in its view that he was able to return to work or in possession of additional medical evidence which contradicted its view. Yet it took no steps to communicate with Mohindra or its own doctor. Nor did it modify its decision. There can be no serious question that the termination was motivated by other reasons.

37. The company knew Mohindra had copies of documents containing environmental information at his home. He had disobeyed the company's direction to destroy this information. It knew he continued to record information, as part of his duties and responsibilities, on environmental matters which it had asked him not to record. The company knew he was objecting to the company's directions that he not report information to the Ministry of the Environment. The company knew he felt it was his duty under the law to report this information. We are satisfied in the result that a major reason for Mohindra's discharge was because of Mohindra's acting in compliance with the Act or seeking its enforcement or providing information to the Ministry. The discharge was therefore in breach of the *Environmental Protection Act*.

38. The Board also heard submissions and ruled upon the appropriate approach to assessing the quantum of damages, if any. Counsel for the complainant submitted that the minimum periods of notice contained in the *Employment Standards Act* applied to the instant case, and should a breach be found, the complainant was entitled to the minimum number of weeks of pay in lieu of notice set out by that statute regardless of his actual losses. Mohindra was successful in obtaining alternative employment, at a higher rate of pay, approximately two months after the June 20th termination. In this case, therefore, the pay in lieu of notice required by the *Employment Standards Act* (we were told) was more than the lost wages for these two months. Counsel submitted that these statutory minimums were the appropriate amounts.

39. The Board does not agree. The Board's consideration of damages (or other remedial action) is based upon the principle of compensation. It is not predicated upon either punitive relief or windfall moneys for a successful complainant. In this respect, we adopt the approach taken by the Board pursuant to its unfair labour practice jurisdiction under the *Labour Relations Act*, wherein the Board has concluded that compensation is the appropriate test. See, for example, *Radio Shack* [1979] OLRB Rep. Dec. 1220, *Third Dimension Manufacturing Limited* [1983] OLRB Rep. Feb. 261. It was not suggested that damages amounting to loss of earnings would not be full compensation for Mohindra for actual loss. We are reinforced in our view that the appropriate principle of damages under this Act is one of compensation, for losses or injury suffered, by the wording of section 134b(8)(c) of the Act which discusses compensation in terms of loss of earnings or other employment benefits:

(8) A determination under subsection (7) may include, but is not limited to, one or more of,

(c) an order directing the employer to reinstate in employment the complain-

ant, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer.

40. The amount of damages one would be entitled to under the *Employment Standards Act* does not directly relate to the damages necessary to compensate the injured party. Indeed, we note that in most cases, the compensation awarded by the Board to successful complainants exceeds the minimums set out in the *Employment Standards Act*. Those minimums do not attempt to address the specific injury or loss suffered by a complainant. It is that actual loss which is the focus of the Board's remedial orders.

41. Accordingly, the Board ruled that the guiding principle for assessing damages was compensation, and not the minimum periods of notice pursuant to the *Employment Standards Act*.

42. The Board shall remain seized with respect to any question of the appropriate compensation.

43. Finally, the company also argued that the complainant's delay in launching this proceeding was grounds to either dismiss the claim or reduce the damages he would otherwise be entitled to. As the letter of termination was not received by the complainant until July 26, 1988, and counsel for the complainant wrote to counsel for the company on August 3, 1988, indicating that legal action might be pursued as a consequence of that termination, we are satisfied that there was no undue delay in putting the company on full notice of the complainant's intention to hold the company legally liable for his discharge. Although the complaint itself was not filed until February 16, 1989, the complainant obtained alternative employment in August 1988 and does not seek reinstatement. We do not consider the delay between August 1988 and February, 1989 to be such, in the circumstances, that the complaint ought to be dismissed, or the amount of compensation (to which the complainant would otherwise be entitled) reduced.

2570-88-R Labourers' International Union of North America, Local 183, Applicant v. Beaverbrook Estates Inc., Respondent.

Certification - Construction Industry - Practice and Procedure - Parties agreeing to removal of two names from "Schedule A" employee list - Employer later asserting these individuals should be included for purposes of count - Board not permitting parties to resile from agreement

BEFORE: Inge M. Stamp, Vice-Chair, and Board Members D. A. MacDonald and J. Redshaw.

APPEARANCES: Bernard Fishbein, L. Baldassarra and M. Fasan for the applicant; Stephen A. McArthur and Murray Parton for the respondent.

DECISION OF THE BOARD; January 4, 1990

1. This application for certification pursuant to the construction industry provisions of the *Labour Relations Act* came on for hearing before the Board on February 27, 1989.

2. The list, or Schedule "A", submitted by the respondent, was settled subject to three challenges by the applicant on the day of hearing. The parties agreed as to who should be properly

on the list, who should be off the list and the applicant challenged three individuals stating its reasons why they should not be on Schedule "A". By majority decision of the Board (differently constituted) dated April 11, 1989 a Labour Relations Officer was authorized to make inquiries with respect to these challenges. Paragraph 9 of that decision reflected the agreement of the parties with respect to Schedule "A" as follows:

9. The parties agreed to the deletion of D. Resendes and M. Resendes from Schedule "A". The applicant is challenging three individuals of the remaining six employees listed on Schedule "A", on the following basis:

L. Melchiorre	section 1(3)(b) managerial exclusion; not at work
T. Oresti	same as above
F. Talarico	not performing bargaining unit work.

3. Pursuant to the Board's decision, the parties met with a Labour Relations Officer in April and May. By letter dated June 26, 1989 the respondent advised the Board that notwithstanding their agreement on the date of hearing (February 27, 1989), the position of the respondent now is that D. Resendes and M. Resendes "should be included in ascertaining whether the applicant has achieved sufficient membership support".

4. A hearing was scheduled on October 2, 1989 to hear the submissions with respect to the Labour Relations Officer's Report. At that hearing, counsel for the respondent, pursuant to its letter of June 26, 1989, raised the issue of the Board's policy with respect to who is in the bargaining unit on the application date for the purposes of the count.

5. The respondent wanted to make submissions to the Board with respect to the Board's policy in construction industry certification applications of counting only those employees at work in the bargaining unit on the date of application. The panel gave an oral ruling at the time as follows:

"This issue could have been raised at the time the reply [to the application for certification] dated January 26, 1989 was filed, or at the time of the initial hearing in this matter on February 27, 1989. The Board will not permit the respondent to raise this issue at this point in the proceedings".

6. By letter dated October 13, 1989 the respondent has asked for reconsideration of the Board's oral ruling of October 2, 1989 as set out above. The respondent submits that the Board's policy is incorrect or alternatively incorrectly applied if it excludes D. Resendes and M. Resendes for the purpose of the count. The respondent further submits that to deny him the opportunity to make submissions with respect to the "policy" is a denial of natural justice.

7. The respondent, in its submissions to the Board on the last day of hearing on October 2, 1989 and in its letters to the Board of June 26, July 6, July 13 and October 13, 1989 takes the position that notwithstanding the agreement on February 27, 1989 to delete D. Resendes and M. Resendes from Schedule "A", they should be included for the purpose of the count and that the Board should allow the respondent to make submissions with respect to that position which is contrary to the Board's well-established policy. The respondent submits that he is not resiling from his agreement that these 2 employees were not at work on the date of application. However, the respondent takes the position that they are employees within the meaning of the *Labour Relations Act* and as such should be included for the purpose of the count. The respondent further submits that since it was agreed that D. Resendes and M. Resendes were not at work on the date of application, this was one of the remaining issues to be dealt with at the October 2nd hearing.

8. The Board's policy with respect to who is in the bargaining unit on the application date for the purpose of the count is not the issue here, but rather whether the respondent at this point in the proceeding can resile from its agreement made in February as to who is properly on Schedule "A".

9. The Board is not persuaded by the respondent's submissions to reconsider its oral ruling of October 2, 1989. At the initial hearing in February, the Board heard submissions with respect to the applicable geographic scope and the Board dealt with the list. Schedule "A" is the list of persons at work in the bargaining unit on the date of application. Only those persons at work on the date of application are employees in the bargaining unit for the purpose of the count. The respondent agreed as to who was properly on Schedule "A" and who should be deleted. It was further agreed as to who was in the appropriate geographic area. The applicant stated its challenges to the list and the reasons. At no time during this exercise of ascertaining who is properly on Schedule "A" did the respondent indicate that it did not accept this list for the purpose of the count. The reason the Board or a Labour Relations Officer goes through this exercise is to establish who is on the list for the purpose of the count. The respondent, by agreeing that D. Resendes and M. Resendes were not at work on the date of application and therefore not on Schedule "A" cannot now say, "we agreed, but it did not mean we agreed to that for the purpose of the count"! For practical purposes, the effect of the respondent's position which was first communicated to the Board by letter dated June 26, 1989, some four months after the initial hearing, is to resile from the agreement as to who is on the list for the purpose of the count. The very reason for the existence of the list is to determine whether the applicant has sufficient membership support in relation to who is properly on the list. The Board will not now allow the respondent to resile from its agreement made in February with respect to Schedule "A". There are valid labour relations reasons why the Board does not allow any party to resile from its agreement as to who is properly on the list for the purpose of the count. This is especially so when the proceedings have been ongoing for some months. Unless there is some finality, certification applications would drag on endlessly. Once the list for the purpose of the count has been agreed to and after the challenged individuals have been examined, it would be unfair to allow parties to resile from their agreement with respect to the list.

10. The Board received the submissions of the parties with respect to the Labour Relations Officer's report and makes the following findings, including a brief summary of the evidence that led to the Board's conclusions.

L. Melchiorre

Exhibit 2, Melchiorre's time card, shows 9 hours assigned to the Richmond Hill job on Monday, January 16, 1989, the date of application. Although it indicates that Melchiorre was at work on the date of application, it does not assist the Board in determining what work was actually performed. Mr. Melchiorre's evidence is not particularly helpful as to what work he performed on the date of application, and so we must look at other factors to determine whether or not he is properly included on the list. Melchiorre was hired by Phil Lani, the President of the company. The company was just starting out and his evidence was that he was not given a specific role. The superintendent at the Richmond Hill site, John Tavone, was fired around the time of this application. Melchiorre from the start has been paid a salary including the time when the labourers were paid by the hour. Melchiorre does not receive overtime pay unlike the hourly-rated employees. The evidence is that Melchiorre was sent to the Richmond Hill site, in his words "so that there's somebody on the site for any deliveries that come in". He explained his duties as "just basically be there for anybody that came, cause there was no... there was no full superintendent at the site at the time I was there". He explained that the superintendent had been fired. At the beginning of the job in Richmond Hill, Melchiorre was "spreading straw on some basements that were left exposed", and doing a "few other odds", some "clean-up" and "at the trailer basically". He started in December. There were approximately ten exposed basements.

However, Melchioro indicated he could not be sure what exactly he was doing on the application date. He was the only person employed by the respondent on the site at the beginning. For the previous two years, Melchioro worked alongside the superintendent. He went from assistant superintendent at the Scarborough site directly to Richmond Hill. Melchioro was instructed to stay at the site until the new superintendent, Dino Alexander, replaced Tavone. Melchioro was looking after the site and subcontractors who were at the site and filling in for the site superintendent from December until February or March. At the time of the application, Melchioro was the only person representing the company at the Richmond Hill site, and when the safety inspector arrived on the site Melchioro told him that he was there temporarily until the new superintendent came on stream. Melchioro then signed the safety inspector's paperwork using the title "Site Superintendent". This took place a few days prior to the application date. He assumed he was the site superintendent because he was the only one there. The report establishes that Melchioro went to look after the job site after the site superintendent was fired and before the new superintendent arrived, including the date of the application. Such manual work as may have been performed by Melchioro is not sufficient to put him properly in the bargaining unit. Having regard to the evidence in the report and the parties' submissions, we find that Melchioro is not properly included on the list.

11. The remaining 2 persons in dispute are T. Oresti and F. Talarico. Having found that Mr. Melchioro is excluded from the bargaining unit, it is not necessary to determine the status of the remaining 2 individuals being challenged. The determination of whether these 2 persons are included in the bargaining unit does not affect the description of the bargaining unit or the applicant's right to be certified. Under these circumstances, the Board may issue a final certificate (see *Robin Hood Multifoods*, [1985] OLRB Rep. July 1159).

12. The description of the bargaining unit is set out in paragraph 8 of the Board's decision dated April 11, 1989.

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on January 26, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 of the Board's decision dated April 11, 1989 in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

15. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering

in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

1891-89-R Marjorie Meighan, Applicant v. Hotel Motel and Restaurant Employees Union Local 442, Respondent v. Berto's Restaurant Inc., Intervener

Employer Support - Evidence - Practice and Procedure - Termination - Applicant's evidence raising possibility employees given time off work to sign termination petition - Scenario relevant to voluntariness and employer support - Board ordering employer to provide union with opportunity to review and photocopy time cards for all bargaining unit employees

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *W. A. Correll* and *C. McDonald*.

APPEARANCES: *Edward Kok* for the applicant; *James A. Whyte* and *W. Whyte* for the respondent; *B. W. Adams*, *T. Ryan* and *A. Perez* for the intervener.

DECISION OF THE BOARD; January 17, 1990

1. The name of the applicant and the respondent is amended to read: "Marjorie Meighan" and "Hotel Motel and Restaurant Employees Union Local 442".

2. This is an application for a declaration terminating bargaining rights.

3. At the commencement of the hearing the Board was advised that the respondent union had caused a summons *duces tecum* to be served upon Tom Ryan, president of the intervener employer. The summons required Mr. Ryan to bring with him and produce the following documents at the hearing:

All Payroll Records
All UIC, CPP, Income Tax Reports to Revenue Canada
Bank Statements
Cheques and Cheque Stubs
Employee Application Forms For Hire.

4. The union sought an order from the Board requiring production of the above noted documents and an opportunity to review same.

5. Counsel for the intervener advised the Board that, although the documents in question had been collected and brought to the hearing, the employer was objecting to any order allowing the union to review the documents. The employer raised questions regarding the validity and enforceability of the summons and asserted that the respondent union was engaged in a fishing expedition and should be required, at a minimum, to satisfy the Board of the arguable relevance of the documents sought to be produced. The employer noted as well that the only matter in dispute between the parties appeared to be the voluntariness of the document filed in support of the application and that the union had not heretofore filed any complaint or made any particularized allegations of misconduct. The Board was referred to *Shaw-Almex Industries Limited*, [1984] OLRB Rep. Apr. 659.

6. After hearing the submissions of the parties the Board ruled orally that, at that stage of the proceedings, the union had been unable to persuade the Board of the arguable relevance of documents it was seeking and consequently no production order issued.

7. The applicant proceeded to call its evidence as to the origination and circulation of the document filed in support of the application. The respondent then called Mr. Ryan whose examination-in-chief was not completed before the Board concluded its hearing on the day.

8. Prior to the conclusion of the hearing, however, a number of further procedural matters arose. Fortunately, with only one exception, the parties were able to resolve these matters at the hearing.

9. The respondent renewed its request with respect to production of documents. At this juncture, however, the respondent was much more specific in what was being sought. In particular the respondent sought production of the following:

- 1) Time cards for all employees working on the days the petition was being circulated.
- 2) Payroll documents to indicate whether or not union dues had been deducted from the pay cheques of three named individuals.
- 3) Documents relating to the deduction of monies from employees' pay for contribution to a "social club". In particular the union was interested in any contributions made by Jill Ryan, Tom Ryan's Spouse.

10. With respect to the last item, Mr. Ryan was able, during a recess in the proceedings, to consult certain records and to ascertain that Jill Ryan had, in the pay period November 23-26, 1989 had \$2.00 donated on her behalf to the social club. Mr. Whyte, on behalf of the union, indicated he was content with this response and was not seeking any further production of documents relating to deductions from pay for contributions to the social club.

11. With respect to the second item Mr. Adams, on behalf of the employer, undertook to provide the union with an opportunity to review the relevant documents.

12. No agreement was reached with respect to the production of time cards.

13. The union asserted that the applicant gave evidence consistent with the conclusion that employees were given time off work for the purpose of signing the petition filed in support of the present application.

14. The Board is satisfied that such a fact, if proved, would be arguably relevant to the issue of the voluntariness of the petition and, in particular, to the issue of management involvement in or perceived management involvement in the origination or circulation of the petition.

15. The Board therefore directs the employer to provide the union with the opportunity to review the time cards in question, specifically the time cards for all bargaining unit employees for the days October 15, 16, 17, 18 and 20, 1989. In order to avoid any further delays in the hearing in this matter, such opportunity shall be provided at the earliest opportunity and, in any event, no later than one week prior to the next scheduled hearing date. The union, if it so desires, should have the opportunity to make photocopies of the documents in question. The original documents should be brought to the next day of hearing in this matter.

16. The Board also notes that the respondent indicated, in writing and orally at the hearing,

that it intended to rely on the history and "climate" of labour relations between the parties in arguing that the present application be dismissed.

17. Mr. Adams, on behalf of the employer, indicated at the outset that, if and when such evidence was sought to be introduced, he would object to its admissibility.

18. In the context of dealing with the earlier noted matters, the Board further canvassed the parties' views with respect to the "climate evidence".

19. The union outlined a series of employer actions involving the discipline and discharge of a number of employees. These events took place over a period of time ranging roughly from the fall of 1988 until approximately three months prior to the date of the first day of hearing in this matter.

20. Some of these incidents were the subject of complaints under section 89 of the Act (which were subsequently settled and withdrawn), some were subject to the grievance and arbitration procedure. There is currently no outstanding litigation arising out of any of these incidents.

21. The employer, while not disputing that these various disciplinary incidents took place, challenged the relevance of these events to the present proceedings and was obviously not prepared to concede that these events either singly or cumulatively constituted unlawful or otherwise improper conduct on the part of the employer.

22. Ultimately, however, Mr. Whyte on behalf of the union indicated that it was not his intention to litigate these disciplinary matters in the context of the present proceedings, and that he would consequently choose not to call any further evidence with respect to the "climate" of labour relations between the parties.

23. Hearing in this matter will continue on February 8, 1990.

1679-89-R Canadian Union of Public Employees, Applicant v. Carleton Roman Catholic Separate School Board, Respondent, v. Group of Employees, Objectors

Certification - Natural Justice - Representation Vote - Employer unable to post Notice to Employees of vote result until day before time fixed for objections - Board ordering posting of decision extending time for objection

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *M. Rozenberg* and *R. R. Montague*.

DECISION OF THE BOARD; January 8, 1990

1. This is an application for certification.

2. In a decision of the Board dated November 16, 1989 the Board (on the agreement of the parties) determined the unit of employees appropriate for collective bargaining, and directed that a representation vote be taken so that those employees could indicate, by secret ballot, whether or not they wished to be represented by the applicant union in their employment relation-

ship with the respondent employer. That vote was taken on November 27 and November 28, 1989. A substantial majority of those casting ballots indicated their desire to be represented by the applicant.

3. Ordinarily, the Board would simply issue a certificate based upon the vote results. There are no allegations of intimidation, coercion or other misconduct which might vitiate the results of that vote. Indeed, the scrutineers from both parties have verified, in writing, that the vote was properly conducted.

4. But there is a problem. The respondent employer has advised the Board that it was unable to post the Form 70 Notice to Employees of the vote results until the day before the time fixed for objections. There have been none, to date, nor are any anticipated; however, out of an abundance of caution, the Board considers it appropriate to direct the employer to post this decision (as it did the Form 70 Notice) in prominent places where it will come to the attention of the employees potentially affected by the application.

5. Should any employee wish to contest the election results s/he will be permitted to do so, by written representation sent by registered mail no later than January 21, 1990. Any such representation must include a detailed explanation why the Board should not act upon the results of the representation vote. If the Board does not receive such representation or, alternatively, receives a representation which does not persuade us that we should disregard the expressed wishes of the employees who voted, a certificate will issue to the applicant union based upon the material before us and the vote results.

1063-89-R International Brotherhood of Electrical Workers Local Union No. 1739, Applicant v. **Gilmar Electric Inc.**, Respondent v. Group of Employees, Objectors

Certification - Certification Where Act Contravened - Charter of Rights and Freedoms - Collective Agreement - Collective agreement having terms favourable to older workers - Employer arguing agreement discriminates on basis of age contrary to *Human Rights Code* and *Charter of Rights and Freedoms* - Board finding no discriminatory intent or effect - Not every distinction between groups constitutes discrimination - Provision not such as to prevent certification or cause collective agreement to be deemed not collective agreement - Board denying intervenor status to Human Rights Commission - Certificate issuing

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *R. M. Sloan* and *R. R. Montague*.

APPEARANCES: *L. A. Richmond* for the applicant; *James E. Bowden* for the respondent; *Kaye Joachim* for the Ontario Human Rights Commission.

DECISION OF THE BOARD; January 16, 1990

1. By decision of the Board dated September 13, 1989, we found the applicant to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* ("the Act"). We further found that the applicant was an affiliated bargaining agent of a designated employee bargaining agency. We also found that this was an application for certification within the meaning of

section 1(1)(p) of the Act and is a application made pursuant to section 144(1) of the Act. In our decision, we also determined and described the unit of employees of the respondent appropriate for collective bargaining, and determined whether a number of challenged individuals were or were not employees within that bargaining unit on the date of application.

2. As a result of the disagreement of the parties as to whether Mr. Ron Sewell was or was not employed in the bargaining unit on the date of application, a Labour Relations Officer was appointed and authorized to inquire into and report to the Board on the nature of work performed by Ron Sewell on the date of application. The Labour Relations Officer conducted such examination and prepared a report for the Board.

3. A hearing was convened on January 11, 1990 to hear the submissions of the parties as to the conclusions the Board should reach in view of the report and to hear the evidence and representations of the parties in respect of all matters arising out of this application including but not limited to the request for reconsideration contained in a letter to the Board dated November 8, 1989 from counsel for the respondent.

4. At the commencement of the hearing before us on January 11, 1990, the respondent withdrew its request for reconsideration and, *inter alia*, the allegations of fraud upon which that request was based and thereby agreed that Mr. Ron Sewell was a registered apprentice electrician.

5. In counsel's letter requesting reconsideration of the Board's decision dated September 13, 1989, counsel also stated:

The respondent also objects to certification on the grounds that the applicant discriminates against its constituents on the basis of age. The Respondent relies on s. 13 of the Labour Relations Act. The Respondent alleges that the Applicant is a party to agreements purporting to be collective agreements including agreements in both the Residential and the (province wide) Industrial, Commercial and Institutional sectors of the construction industry, which on their face discriminate on the basis of age, contrary to the *Human Rights Code*. The Respondent alleges the applicant is the party which has encouraged such discriminatory language.

6. At the hearing on January 11, 1990, counsel for the Human Rights Commission sought status to intervene in these proceedings. After consideration of the submissions of counsel of the applicant, the respondent and the Human Rights Commission, the Board orally ruled as follows

In this application for certification, the Human Rights Commission seeks Intervener status in view of the fact that the respondent has notified the Commission that it intends to object to the certification of the applicant on the grounds that the applicant discriminates against its members on the basis of age. In this regard, the respondent relies on section 13 and section 48(1)(b) of the *Labour Relations Act*.

Counsel for the Commission argues that, in as much as this Board may interpret or attempt to interpret what constitutes "discrimination" pursuant to the Human Rights Code, the Commission is "affected" by these proceedings and ought therefore to be granted Intervener status. Alternatively, counsel for the Commission offers its assistance as "friend to the Board" because the Commission is charged with certain responsibilities under the Human Rights Code as outlined in section 28 of the Code and can therefore offer its expertise to the Board in determinations under section 13 and section 48. Counsel argues that as master of our own proceedings, we can grant status to the Commission.

Counsel for the applicant objects to granting the Commission status to intervene. Counsel for the respondent takes no position with regard to the status of the Commission to intervene.

After considering the submissions of the parties, we have determined that the Commission does not have status to intervene in these proceedings and decline to grant the Commission such sta-

tus. The Board also graciously declines the Commission's offer of assistance as a friend to the Board.

7. Thereafter, we heard the submissions of the parties as to the conclusions we should reach in view of the Labour Relations Officer's report. At the conclusion of those submissions, the Board orally ruled as follows:

The Board finds that on the date of application, Mr. Sewell was engaged primarily in tying down conduit and not in pulling cable or Coroflex. The Board finds that the work of tying down conduit is part of the installation of conduit and is work of an electrician or an apprentice electrician. The mere fact that someone who is not a journeyman or apprentice electrician can or may from time to time perform this work is not determinative. The Board has long recognized that there is an overlap of work, functions and work jurisdictions between and amongst trades. The mere fact that someone who is not a journeyman or apprentice electrician, such as a labourer, can or may do this work does not mean that this is not journeyman or apprentice electrician work, any more than the fact that if a labourer does the work, that labourer does not become a journeyman or apprentice electrician by reason of performing the work.

We therefore find that Mr. Sewell was employed in the bargaining unit on the date of application and is properly included on the list of employees.

8. The only issue which remained outstanding thereafter was the respondent's assertion that the applicant could not be certified by reason of the provisions of section 13 of the Act. At the hearing, reference was also made to section 48(1)(b) of the Act. These sections provide:

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code, 1981* or the *Canadian Charter of Rights and Freedoms*.

48. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purpose of this Act,

- (b) if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code, 1981* or the *Canadian Charter of Rights and Freedoms*.

9. Counsel argued that the provisions of the collective agreement between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario (hereinafter referred to as the Provincial ICI collective agreement) to which this respondent would become automatically bound by operation of law upon certification (by reason of the province-wide bargaining provisions found in the Act) were discriminatory. Counsel argued that the collective agreement discriminates against persons by reason of their age, that such discrimination is prohibited by the *Human Rights Code, 1981* ("the Code") and that therefore the Board could not certify the applicant. In support, counsel pointed to the following articles found in the collective agreement.

704 OLDER EMPLOYEES

Where five or more Journeymen are employed every fifth Journeyman shall be 50 years of age or older, where available.

1906 STOREKEEPER

Where there is a full time Electrical Storekeeper required on a project, he shall be a journeyman electrician and preference shall be given to older members.

SECTION 21 - LOCAL APPENDIX - L.U. 105 - HAMILTON**Clause 603**

The Contractor agrees to exercise sound reasoning in the proper placement of employees, with respect to age and ability to climb. No employee shall be discriminated against for refusal to climb.

SECTION 21 - LOCAL APPENDIX - L.U. 804 - CENTRAL ONTARIO**Clause 900 J.5****HEIGHT PAY - CONDITIONS AND RATES**

- (c) Contractor agrees to exercise sound reasoning in the proper placement of employees with respect to age and ability to climb.

10. Counsel for the applicant asserted that these provisions were not discriminatory. In the alternative, he submitted that if these provisions were discriminatory, they were nevertheless not prohibited by the Code by reason of the "affirmative action" or "special programs" provision found in section 13 of the code. That section provides:

13.-(1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

11. We heard the evidence of Mr. Ralph Tersigni. Mr. Tersigni is an International President of the International Brotherhood of Electrical Workers. He is, and has been involved in both the negotiation and administration of the Provincial ICI collective agreement. Mr. Tersigni testified that each of the impugned articles has been in the province-wide ICI collective agreement at least since the advent of province-wide collective bargaining. Mr. Tersigni testified that clause 7.04 is applied only in lay-off situations and was negotiated to provide some measures of job security for the older tradesmen who had been employed in the construction trade for many years. In view of the hiring hall system prevalent in the construction industry, the temporary nature of work in that industry and the transient nature of persons employed in the industry, "typical" seniority provisions which attempt to equate job security with length of service are rare in collective agreements pertaining to the construction industry. Mr. Tersigni testified that the impugned provision was an attempt by the union to provide some security for older workers because, the trade union's experience had been that, in cases of lay-off, employers were laying off older members of the union before the younger members. Mr. Tersigni attributed this fact to the perception that perhaps the older members were somewhat slower than younger members either by mere reason of age or because they might have experienced a previous accident on site. Similarly, clause 1906 and the "climbing provisions" in the local appendices were designed to provide job security to older members of the union by providing them preferred access to the less physically demanding jobs. Mr. Tersigni spoke of all these provisions as indicative of the respect which younger members of the trade accorded older members who had, in the past devoted themselves to working in the trade.

12. Mr. Tersigni was not aware of any grievances by any younger members who claimed to be materially affected by these provisions, nor was he aware of any hardships placed upon younger members employed in the trade as a result of these provisions. There have been no proposals put forth by any member of the union to remove these provisions, and indeed any proposals which have been made in respect of these provisions have been to "strengthen them".

13. We do not propose to set out the exhaustive arguments made by both counsel or the

cases to which they referred. In our view, these provisions of the collective agreement do not discriminate against any person because of any ground of discrimination prohibited by the Code, within the meaning of sections 13 and 48(1)(b) of the Act. We agree with and adopt the decision of the Supreme Court of Canada in *Andrews v. Law Society of British Columbia* 56 D.L.R. 4th 1 (S.C.C.) that not every distinction or differentiation between the treatment of groups or individuals amounts to "discrimination".

14. In our view, the words "discriminate" and "discrimination" contain their own inherent limits. As stated in *Andrews, supra* and certainly in the context of sections 13 and 48(1)(b) of the Act, we must also look to whether there is a discriminatory effect as a result of these provisions.

15. The effect of the impugned provisions of the collective agreement are to provide some accommodation, security, recognition and assistance to those members of the trade who have spent many of their years employed in the trade. The purpose and effect of the provisions are not motivated by any malice or based on any invidious reasons. Indeed, the purpose and effect of the provisions are reasonable and laudable and were negotiated for sound, cogent labour relations and proper purposes. There is no evidence to suggest that the provisions have caused any adverse or improper effects. We note parenthetically that it is the respondent employer and not any individual employee complaining that these provisions of the collective agreement are discriminatory.

16. Finally, we note that the provisions have been in existence for many years and appear to be well accepted, not only by the trade union but equally by the designated employer bargaining agency with whom the trade union negotiates.

17. Under these circumstances, we are of the view that these provisions in the collective agreement do not prohibit the certification of the trade union by reason of section 13 of the Act. Similarly, the presence of these provisions of the collective agreement do not cause us to conclude that the collective agreement should be deemed not to be a collective agreement pursuant to section 48(1)(b) of the Act.

18. The Board is satisfied on the basis of all the evidence before it that more than fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 4, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

19. Pursuant to section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

20. Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 of our decision dated September 13, 1989 in respect of all journeymen and apprentice electricians in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

21. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all journeymen and apprentice electricians in the employ of the respondent in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

2678-88-R Labourers' International Union of North America, Local 506, Applicant v. **Gottcon Contractors Limited**, Gottardo Properties Limited, Gottardo Contracting (1980) Inc., Gottardo Contracting Co. Limited, Gottardo Holdings Company Ltd., Gottardo Management Limited, and Gottardo Corporation, Respondents v. The Bricklayers, Masons Independent Union of Canada, Local 1, Intervener

Bargaining Unit - Certification - Construction Industry - Related Employer - Labourers' union seeking certification under provincial ICI sector provisions for employees of related employer - Bricklayers' union already holding bargaining rights for bricklayers' assistants with related employer - Labourers' seeking bargaining unit description excluding bricklayers' assistants for whom other union holding bargaining rights - Certificate issuing

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. Gibson* and *J. Redshaw*.

APPEARANCES: *E. M. Mitchell* and *E. D. Ferreira* for the applicant; *Carl Peterson* for the respondents; *Susan Ursel* and *John Meiorin* for the intervener.

DECISION OF THE BOARD; January 26, 1990

Facts

1. This is an application for certification. By oral decision of the Board on July 11, 1989 (decision reduced to writing July 18, 1989) we granted the applicant's request that, pursuant to section 1(4) of the *Labour Relations Act* ("the Act") the respondents be declared to be one single employer for purposes of the Act. At the same time, by reason of the exercise of our discretion under section 1(4), we dismissed a similar application (Board File No. 2857-88-R) brought by The Bricklayers, Masons Independent Union of Canada, Local 1 ("Bricklayers, Local 1"), the intervener in this application.

2. In our decision granting the section 1(4) application, we did not address the issue of the intervener's status to intervene in *this* application, nor did we address the issue as to the description of the appropriate bargaining unit. Those two issues are closely intertwined and will be dealt with in this decision.

3. The parties agreed that the evidence which we heard in respect of the section 1(4) applications could be considered and applied when we rendered our decision in this certification application in respect of the intervener's status and the bargaining unit description. In addition to that evidence, we heard a further three days of evidence from Mr. Aldo Gottardo, Mr. John Meiorin, and Mr. Salvatore Caivano. The evidence of those witnesses did not materially affect the findings

of fact made in our earlier decision but merely supported, and to some extent elaborated upon the evidence which we heard when we dealt with the section 1(4) applications. We have considered this additional evidence, but find that the following findings of fact made in our earlier decision accurately summarize the evidence:

Gottardo Contracting (1980) Inc. and its predecessor companies is and was primarily a masonry contractor. Gottardo Contracting (1980) Inc. was incorporated on November 18, 1980. Gottardo Contracting (1980) Inc. (hereinafter referred to as Gottardo (1980)) is the successor to Gottardo Contracting Co. Limited. Gottardo Contracting Co. Limited was a member of the Masonry Contractors Association of Toronto from 1961 until 1980 when Gottardo (1980) took over. Gottardo (1980) is bound to the collective agreements between the Masonry Contractors Association and the Bricklayers Independent Union, Local 1 covering journeymen and assistants (hereinafter referred to as the Bricklayers, Local 1 collective agreements).

Renato Gottardo started as a masonry contractor in the early 1950's. Renato Gottardo ran the business through Gottardo Contracting Co. Limited until his son, Aldo Gottardo, joined the business in 1978. Since 1978, Renato Gottardo and Aldo Gottardo have jointly run Gottardo Contracting Co. Limited and then the group of companies when they were established in the 1980's.

Beginning in 1978 Gottardo Contracting Co. Limited started to act as a general contractor in addition to performing masonry work. In addition to acting as a general contractor, the company would also perform excavation and concrete forming work. In 1980 Gottardo (1980) continued the same work previously performed by Gottardo Contracting Co. Limited. Gottardo Contracting Co. Limited became dormant and remains a shell.

From 1980 until 1985, Gottardo (1980) continued acting as a general contractor and masonry contractor. In addition, Gottardo (1980) would perform excavation and concrete forming foundation work.

In performing this work, Gottardo (1980) used journeymen bricklayers, bricklayers' assistants and general labourers. When help was required on the excavation work the company would use both bricklayers' assistants and general labourers to assist with the excavation, the building of the concrete forms and the back filling of the trenches. Conversely, when the bricklayers' assistants required help, the company would assign general labourers to perform bricklayers' assistants' work on the masonry portion of the job.

Beginning in 1980, Gottcon Contractors Limited (hereinafter referred to as "Gottcon") began to bid on jobs as a general contractor. From 1980 until 1985, Gottcon did not employ anyone directly and would subcontract out all the work. Gottcon sub-contracted approximately 90% of the masonry and general labouring work to Gottardo (1980) from 1980 to 1985.

In 1985, Gottardo (1980) transferred its general labourers to Gottcon. Beginning in 1985, Gottardo (1980) had ceased to act as a general contractor.

Prior to this transfer of general labourers to Gottcon, and while employed by Gottardo Contractors (1980) Inc., the Bricklayers, Local 1 collective agreements were applied to those persons subsequently transferred to Gottcon. While employed by Gottardo Contracting (1980) Inc. these persons were paid in accordance with the rates of pay established in the Bricklayers, Local 1 collective agreements and dues and health & welfare benefits were deducted and subsequently remitted to the union on their behalf. After the transfer of the general labourers to the Gottcon payroll, the Bricklayers, Local 1 collective agreements were no longer applied to those general labourers then employed by Gottcon in-so-far as, for example, they were not paid in accordance with the rates of pay set out in the Bricklayers, Local 1 collective agreement and neither dues nor health & welfare benefit deductions were made or remitted to the Bricklayers, Local 1 union on their behalf.

Gottcon, as a general contractor, continued to sub-contract out approximately 90% of the masonry work to Gottardo (1980). When Gottcon and Gottardo (1980) were on the same construction site the companies continued its previous practice of assisting each other with their

respective crews. For example, general labourers employed by Gottcon would help bricklayers' assistants working for Gottardo (1980) when needed while bricklayers' assistants working for Gottardo (1980) would help the general labourers working for Gottcon in the excavation of the site, the construction of the concrete forms and the back filling of the trenches. The companies followed this practice on a daily basis when both Gottcon and Gottardo (1980) were on the same site. Given the fact that Gottardo (1980) derives most of its masonry work from Gottcon, the two companies are on the same site almost all the time.

After 1985, Gottardo (1980) continued to bid for both masonry and excavation work. If Gottardo (1980) was successful in tendering for both masonry and excavation work, Gottardo (1980) would perform the masonry work and Gottcon would perform the excavation and form work with its general labourers. When the bricklayers' assistants performed general labourers' work, they are under the supervision of the Gottcon Superintendent. When the general labourers of Gottcon are helping the bricklayers' assistants of Gottardo (1980), they are under the supervision of the Gottardo (1980) Superintendent.

From the totality of the evidence we find that since 1985 Gottardo Contracting (1980) Inc. has employed and continues to employ "bricklayers" and "bricklayers' assistants". Persons employed by Gottardo Contracting (1980) Inc. in these classifications are covered by the Bricklayers, Local 1 collective agreement. Since 1985 Gottardo (1980) [sic] has not employed directly any persons classified as "general labourers". Gottcon employs the "general labourers" and the Bricklayers, Local 1 collective agreement has not been applied to those persons. The bricklayers, bricklayers' assistants and general labourers of these two companies work side by side, as an integrated work force and are often used interchangeably to perform the work required. Where Gottcon's general labourers are used to assist the Gottardo Contracting (1980) Inc. bricklayers and/or bricklayers' assistants however, they continued to be paid by Gottcon in accordance with the individual rate of pay. Similarly, when Gottardo Contracting (1980) Inc. bricklayers' assistants are used to perform general labourer work they continued to be paid in accordance with the terms of the Bricklayers, Local 1 collective agreement, and dues and other deductions continue to be made and remitted on their behalf. In those cases, where the employees of these companies are interchanged, an internal accounting procedure is used to invoice the one company for the services provided by the employees of the other company i.e. Gottcon invoices Gottardo Contracting (1980) Inc., and Gottardo Contracting (1980) Inc. pays Gottcon for labour provided when Gottardo (1980) uses Gottcon general labourers while the reverse is also true.

In this decision Gottardo Contracting (1980) Inc. and Gottcon Contractors Limited will be referred to as "Gottardo" and "Gottcon" respectively.

4. During the course of the evidence which we heard after we rendered our decision on July 11, 1989, we admitted and have therefore considered the evidence of membership filed by Bricklayers, Local 1. That evidence was tendered after counsel for the Labourers' International Union of North America, Local 506, ("Labourers") raised for the first time, the issue as to the intervener's status to intervene in this application for certification. That membership evidence corresponds to certain names on the list of employees which the respondent employer has filed. That finding is sufficient to dispose of applicant counsel's submissions that the intervener has no status to intervene. The membership evidence establishes that, irrespective of the Bricklayers, Local 1 position that it is the bargaining agent for employees affected by the application, and that those persons are covered by the collective agreement which the Bricklayers, Local 1 has with Gottardo, (a submission which we will address herein), Bricklayers, Local 1 represents some employees who may be affected by the application. On that basis alone, the Bricklayers, Local 1 has status to intervene.

5. Counsel for the Labourers concedes that, in this application, the Labourers cannot acquire any bargaining rights for those bricklayers' tenders, (alternatively referred to as bricklayers' assistants or masons' tenders) employed by Gottardo who are represented by Bricklayers, Local 1 and covered by the collective agreement between Bricklayers, Local 1 and Gottardo.

Counsel states that the applicant does not want to acquire, or interfere with those bargaining rights. For that reason, in this application the Labourers seek a bargaining unit described in the following terms:

all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry, in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, and those masons' or bricklayers' tenders in bargaining units for which any trade union held bargaining rights as of January 27, 1989, and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and those masons' or bricklayers' tenders in bargaining units for which any trade union held bargaining rights as of January 27, 1989.

6. Counsel argues that this description protects the bargaining rights held by Bricklayers, Local 1, while at the same time allowing those who are currently unrepresented to be represented by the trade union of their choice. Counsel emphasizes however that in the event Gottardo commences to employ construction labourers other than bricklayers' assistants, (the Labourers' position being that only bricklayers' assistants are covered by the collective agreement which Bricklayers, Local 1 has with Gottardo) those construction labourers would fall within the applicant's bargaining unit and be covered by the Labourers' collective agreement.

7. The respondent and the intervener submit that the applicant cannot be certified for the bargaining unit it seeks. It was argued that, by reason of the statutory provisions relating to the scheme of province-wide bargaining, the Labourers *must* be certified for its "standard" bargaining unit which, in this case consists of *all* construction labourers *including* bricklayers' assistants or "masons' or bricklayers' tenders" (to use the language found in the employee bargaining agency designation). In the circumstances of this case that "standard" bargaining unit is not available because of the existing bargaining rights of Bricklayers, Local 1. Counsel argued that the bargaining unit applied for in this application was an attempt by the Labourers to "carve out" *part* of its trade. Such a "carve out" is prohibited by the statutory language and scheme of province-wide bargaining, and in the alternative ought not to be permitted in any event because it does not make sound labour relations sense or further future harmonious labour relations. It was submitted that this application was untimely and the Labourers must await the "open period" of the Bricklayers, Local 1 collective agreement, and seek during that period to displace the Bricklayers, Local 1 bargaining rights, while at the same time acquiring those bargaining rights for the employees currently unrepresented.

8. This application therefore raises two distinct but inter-related issues or questions. First, does the collective agreement between Bricklayers, Local 1 and Gottardo ("the Bricklayers' agreement") cover some or all of the trades covered by the designation order which pertains to this applicant, and therefore potentially employees affected by this application? Second, can, and in the alternative should, the Board in this application certify the Labourers, for the bargaining unit which it seeks?

9. First, it is apparent from the Bricklayers' collective agreement itself, and indeed it was not disputed that, at the very least, that agreement covers bricklayers' assistants. Although there is a dispute amongst the parties as to the scope of that collective, it is not disputed that *some* of the employees potentially affected by this application are covered by the Bricklayers' agreement. This application has not been brought during the "open period" of that collective agreement. It is

agreed that the Labourers cannot seek to be certified for persons covered by that collective agreement. It is therefore necessary to answer the second question and determine whether the Board can grant to the Labourers in this application a bargaining unit which excludes a part of the trade (bricklayers' assistants) which the Labourers are designated to represent by reason of the Ministers' designation order made pursuant to section 139 of the Act.

10. Before turning to the submissions of the parties, it is useful to set out the provisions of the *Labour Relations Act* to which reference will be made.

137.-(1) In this section and in sections 135 and 138 to 151,

- (a) "affiliated bargaining agent" means a bargaining agent that, according to established trade union practice in the construction industry, represents employees who commonly bargain separately and apart from other employees and is subordinate or directly related to, or is, a provincial, national or international trade union, and includes an employee bargaining agency.
- (b) "bargaining", except when used in reference to an affiliated bargaining agent, means province-wide, multi-employer bargaining in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e);
- (c) "employee bargaining agency" means an organization of affiliated bargaining agents that are subordinate or directly related to the same provincial, national or international trade union, and that may include the parent or related provincial, national or international trade union, formed for purposes that include the representation of affiliated bargaining agents in bargaining and which may be a single provincial, national or international trade union;
- (d) "employer bargaining agency" means an employers' organization or group of employers' organizations formed for purposes that include the representation of employers in bargaining;
- (e) "provincial agreement" means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions representing terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(3).

(2) Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry referred to in clause 117(e), except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

139.-(1) The Minister may, upon such terms and conditions as the Minister considers appropriate,

- (a) designate employee bargaining agencies to represent in bargaining provincial units of affiliated bargaining agents, and describe those provincial units;
- (b) notwithstanding an accreditation of an employers' organization as the bargaining agent of employers, designate employer bargaining agencies to represent in bargaining provincial units of employers for whose employees affiliated bargaining agents hold bargaining rights, and describe those provincial units.

(2) Where affiliated bargaining agents that are subordinate or directly related to different provincial, national or international trade unions bargain as a council of trade unions with a single employer bargaining agency for a province-wide collective agreement, the Minister may exclude such bargaining relationships from the designations made under subsection (1), and subsection 146(2) shall not apply to such exclusion.

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

(2) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade unions on whose behalf the application is brought, or, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade unions on whose behalf the application is brought, the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(3) Notwithstanding subsection 119(1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

(4) A voluntary recognition agreement in so far as it relates to the industrial, commercial and institutional sector of the construction industry shall be between an employer on the one hand and either,

- (a) an employee bargaining agency;
- (b) one or more affiliated bargaining agents represented by an employee bargaining agency; or
- (c) a council of trade unions on behalf of one or more affiliated bargaining agents affiliated with the council of trade unions,

on the other hand, and shall be deemed to be on behalf of all the affiliated bargaining agents of the employee bargaining agency and the defined bargaining unit in the agreement shall include those employees who would be bound by a provincial agreement.

(5) Notwithstanding subsections (1) and (4), a trade union that is not represented by a desig-

nated or certified employee bargaining agency may bring an application for certification or enter into a voluntary recognition agreement on its own behalf.

146.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

(3) Every provincial agreement shall provide for the expiry of the agreement on the 30th day of April calculated biennially from the 30th day of April, 1978.

For ease of reference the acronyms A.B.A., E.B.A. and Er.B.A. will be used for the terms affiliated bargaining agent, employee bargaining agency and employer bargaining agency respectively.

11. The relevant provision of the Minister's designation is as follows:

Pursuant to clause *a* of subsection 1 of section 127 of the Labour Relations Act, R.S.O. 1970, c. 232, as amended, I hereby designate the Labourers International Union of North America and the Labourers International Union of North America, Ontario Provincial District Council as the employee bargaining agency to represent in bargaining all construction labourers, including masons or bricklayers' tenders, and all employees engaged in cement finishing, waterproofing or restoration work...

Submissions of the Parties

12. Counsel for the respondent and the intervener made similar submissions. Most of their submissions dealt with the appropriateness of the bargaining unit description as it relates to the industrial, commercial and institutional (ICI) sector. Both counsel focused on the overall scheme of province-wide bargaining, stating that this scheme *requires* that, in circumstances such as these, where the applicant applies pursuant to section 144(1) of the Act, the Board *must* describe the bargaining unit in terms which are consistent with the designation order and the province-wide ICI collective agreement of the applicant trade union. Counsel pointed to the language found in section 144(1) which states that "the unit of employees ... *shall* include *all* employees who *would be* bound by a provincial agreement" [emphasis added]. Counsel submitted that this language clearly indicates that, in respect of the ICI sector of the construction industry, the Board cannot grant the bargaining unit sought in this application because, that bargaining unit excludes persons, namely masons' or bricklayers' tenders employed by Gottardo, who *would be bound* by the Labourers provincial collective agreement. There is no dispute that the Labourers' provincial ICI collective agreement covers bricklayers' tenders.

13. Counsel also submitted that the mandatory language of section 139 and section 144(1) dictates that the Board cannot describe an ICI sector bargaining unit in a manner which is inconsistent with the relevant designation order. The relevant designation order in this instance makes specific reference to bricklayers' tenders. It was asserted that although the Board need not use the precise words of the designation order, the Board *must* by reason of section 139 and section 144 include in its description of the bargaining unit all employees covered by that designation order. Counsel argued that in this case, in view of the existing bargaining right of the Bricklayers, Local 1, the Board could not include *all* such employees in the bargaining unit description.

14. In support of these submissions, counsel pointed to the absence of the words “unless bargaining rights for such geographic area have already been acquired ...” in respect of the description of the ICI sector bargaining unit. Counsel submitted that although those words were contained in section 144(1) in respect of all other employees employed in all other sectors in the construction industry, (thereby *potentially* permitting an E.B.A. or A.B.A. to be certified for something “less” than its “standard” bargaining unit in those sectors of the construction industry other than the ICI sector) the absence of such words from that portion of the section which deals with the description of the ICI bargaining unit was significant. In effect, it was argued that, had the Legislature so intended, it could have drafted similar language to permit an E.B.A. or A.B.A. to acquire all available ICI bargaining rights excluding only that portion of those bargaining rights which had already been acquired. That the Legislature was capable of doing so is evidenced by the language found in the latter part of section 144(1). That the Legislature chose not to do so is therefore significant.

15. Counsel argued that this position was reinforced by an examination of section 144(4) and the Board’s jurisprudence regarding that section. It was submitted that section 144(4) indicates that a voluntary recognition agreement which relates to the ICI sector of the construction industry which is not province-wide and/or which does not cover all employees “who would be bound by a provincial agreement” is null and void (*Rockwall Concrete Forming (London) Ltd.*, [1988] OLRB Rep. Sept. 963). Counsel emphasized that the language of section 144(4) was, in all material respects, identical to the language of section 144(1) relating to certification in the ICI sector of the construction industry. Counsel argues that if a voluntary recognition agreement *must* be consistent with the Minister’s designation order and include all employees who would be bound by the provincial collective agreement, the same reasoning must apply when the Board grants the “recognition” or certifies an E.B.A. or A.B.A. in the ICI sector.

16. Counsel stated that the reason why an E.B.A. or an A.B.A. could not, in the ICI sector, be certified for a unit which does not include all employees covered by its provincial collective agreement and/or which does not include all employees covered by the Minister’s designation is simply to preserve the integrity of the scheme of province-wide bargaining in the ICI sector. Counsel argued that to permit the bifurcation of a trade, or a carve out of part of a trade, as suggested by the Labourers in this application would emasculate the province-wide bargaining scheme.

17. Counsel submitted that the scheme of province-wide bargaining had, in the past, dictated certain results which may have appeared anomalous or inconsistent with other provisions of the Act, or the democratic and majoritarian principles which underlie the certification procedures of the Act including the right to be represented by the trade union of one’s choice. Thus, for example an E.B.A. or A.B.A. cannot, in the ICI sector, organize or seek to represent *more* than the unit of employees whom it is designated to represent. The Board has concluded that to hold otherwise would be disruptive of the scheme of province-wide bargaining (see for example *Clarence H. Graham Construction Limited*, [1981] OLRB Rep. Sept. 1195.) This policy has affected the ability of employees to choose which trade union can represent them, as it is impossible for employees to cross craft lines and be represented by another craft union (A.B.A. or E.B.A.) in the ICI sector of the construction industry.

18. Conversely, it was argued that to permit an A.B.A. or E.B.A. to organize or seek to represent *less* than the unit of employees whom it is designated to represent is equally disruptive of the scheme of province-wide bargaining, would create undue fragmentation, and recreate the proliferation of bargaining units which the statutory scheme and the Board’s own jurisprudence has sought to avoid. In this regard, counsel pointed to those many cases of the Board in which the Board has stated that all the employees covered by the Minister’s designation order and who would

be bound by the provincial collective agreement must be included in the bargaining unit for certification purposes, and that the Board will not bifurcate a trade (see for example, *Dufresne Piling Co. (1967) Ltd.*, [1984] OLRB Rep. July 924, *Lay-All Drywall Ltd.*, [1988] OLRB Rep. March 308, *Wraymar Construction and Rental Sales Ltd.*, [1989] OLRB Rep. June 682, *Kraft Construction Company (1978) Ltd.*, [1989] OLRB Rep. Feb. 169, *Manacon Construction Limited*, [1983] OLRB Rep. March 407, *Aero Block and Precast Ltd.*, [1984] OLRB Rep. Sept. 1166, and *E.K.T. Industries Inc.*, unreported decision of the Board, File No. 1856-83-R released March 27, 1987).

19. Counsel further submitted that to permit the Labourers in this application to carve out a part of its designated trade was also contrary to section 146(2) of the Act which mandates that an E.B.A. shall make only one provincial agreement for each provincial unit that it represents. It was argued that if the Labourers are successful in obtaining certificates for the bargaining unit it seeks, there would in effect be two provincial agreements. One would be the current provincial collective agreement which applies to all construction labourers including masons' and bricklayers' tenders. The other provincial collective agreement would be a separate collective agreement applicable to only a fragment of that designated unit namely, construction labourers, save and except masons' and bricklayers' tenders employed by Gottardo. Counsel submitted that the entire structure of unified province-wide bargaining would be undermined if the E.B.A.'s and their A.B.A.'s could in effect make separate collective agreements in respect of only a portion of the employers' workforce which it is designated to represent. It was argued that such a separate and distinct collective agreement for this employer would have the effect of permitting the Labourers and Gottardo to make a bargain in which Labourers have agreed not to claim a portion of the work which they would normally acquire. That, it was argued, gave this masonry contractor an unfair advantage or a benefit that other masonry contractors did not have.

20. Along similar lines it was asserted that to grant the Labourers the unit which it seeks at this time would lead to untenable results in the event the Labourers made a timely application to displace Bricklayers, Local 1. If the Labourers were successful at that time, it would have two collective agreements covering work in the ICI sector with the same employer. It was further submitted that the Labourers must therefore wait until the "open period" of the Bricklayers, Local 1 collective agreement, and at that time apply for a "global unit" of *all* the construction labourers of the employer which the Labourers are designated to represent, including masons' or bricklayers' tenders.

21. Counsel asserted that the issue in this case is not about the right of representation, but merely the appropriateness of this particular bargaining unit. Counsel argues that these currently unrepresented employees can still be represented by any other non-A.B.A. trade union, or, for that matter, by this trade union had the Labourers not chosen to seek a common employer declaration for a group of the Gottardo family of companies which includes Gottardo (1980), the entity which employs the employees represented by Bricklayers, Local 1. In this regard, counsel argued that the Labourers chose to frame a section 1(4) application to include Gottardo (1980) thereby dictating who the respondent employer is for purposes of its certification application. Having successfully sought an expansive description of who is the "employer", the Labourers must accept the consequences of that description. Those consequences include the fact that the Labourers cannot apply for a bargaining unit which comprises only part of its designated trade of employees or part of the employees of the employer. Those consequences also include the fact that any application in respect of the employees employed by Gottardo (1980) is untimely because of the existing bargaining rights of Bricklayers, Local 1. It was submitted that to hold otherwise would be to have granted the Labourers its section 1(4) declaration on the one hand, and then permit them to "give away" the declaration on the other hand by excluding from the bargaining unit description those employ-

ees employed by Gottardo. Put colloquially, the substance of the argument was that the Labourers had made their own bed and must now lie in it.

22. It was also argued that the failure to certify the Labourers for the bargaining unit it seeks in this application did not preclude the unrepresented employees from being represented by the trade union of their choice (in this case the Labourers), but merely postponed it for a short period of time. The existing collective agreement between Gottardo and Bricklayers, Local 1 expires May 31, 1990. The Labourers could, during the open period of the Bricklayers, Local 1 collective agreement, apply to displace Bricklayers, Local 1 while at the same time seeking to be certified for its "standard" bargaining unit of employees of this respondent employer.

23. Both counsel addressed the effect, if any, of section 137(2) of the Act. That provision lends some support to the argument that the Legislature recognized that there could be some situations in which a unit, other than a "standard" province-wide unit could be created in respect of the employees of the employer employed in the ICI sector. Section 137(2) extends local bargaining rights province-wide by operation of law. Where an A.B.A. has acquired bargaining rights in any geographic area in Ontario, an employer is deemed to have recognized its sister locals (or all other A.B.A.'s represented by the E.B.A.) throughout Ontario in respect of the employees of the employer employed in the ICI sector. The concluding words of section 137(2) however, state that such deemed recognition does not include "those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights." Thus, in the ICI sector it is possible that, because of pre-existing bargaining rights, an E.B.A. and its A.B.A.'s cannot in fact, acquire bargaining rights on a province-wide basis.

24. Counsel submitted that section 137(2) deals merely with "geography". Section 137(2) is an "exception" which permits the artificial extension of bargaining rights for an A.B.A. into other geographic areas. It does not go so far as to support the proposition that a bargaining unit can be carved up into classifications in either one geographic area or throughout the province. Counsel also submitted the deemed recognition in section 137(2) can only come into effect once an A.B.A. has obtained bargaining rights. In the circumstances of this case, the A.B.A. cannot obtain bargaining rights for the unit which it seeks because of the statutory prohibition of section 144(1). It was submitted that consideration of section 137(2) therefore was largely irrelevant.

25. Counsel further argued that if we do not accept that the statutory language prohibits the Board from granting a bargaining unit in the terms sought in this application, pursuant to our general discretion to determine the appropriate bargaining unit we should nevertheless determine that the bargaining unit which the Labourers seek is *not* appropriate. In support of this submission, counsel referred to the principles of undue fragmentation, placing particular emphasis on the fact that the Board has not, in any previous instance permitted a trade union to bifurcate its trade and be certified for a "part" or a "sub-species" of that trade. Indeed, the Board's usual practice is to the contrary, namely, to certify applicants to whom sections 144(1) to 144(4) do not apply with reference to all trades on the job on the date of the making of the application. In support, counsel cited *Winter & Son*, [1967] OLRB Rep. Feb. 889, *Duron Ontario Limited*, [1976] OLRB Rep. Nov. 734, *C. T. Windows*, [1983] OLRB Rep. May 627, *Ninco*, [1982] OLRB Rep. Nov. 1692, *A. N. Shaw Restoration Ltd.*, [1981] OLRB Rep. March 241, *Kraft Construction*, *supra*. Each of these decisions in one manner or another articulate the concern that, in the construction industry, where fragmentation of an employer's workforce along craft and/or trade lines is already firmly entrenched, it is particularly desirable to avoid further fragmentation.

26. Counsel for the respondent stated that the evidence in this case clearly establishes that the workforce of the respondent, the bricklayers and bricklayers' tenders employed by Gottardo

and the general labourers employed by Gottcon, work side by side as an integrated workforce and are often used interchangeably to perform the work required. The evidence discloses that on a regular basis, the work performed by a bricklayer's tender is also performed by a general labourer and vice-versa. The semantics used to identify or classify the employees of these two companies appear to be irrelevant. On the evidence there is no work that is exclusive to the bricklayers' tenders employed by Gottardo or is work which is not done by the labourers employed by Gottcon. Regardless of whether these persons are called bricklayers' tenders or construction labourers, each classification regularly and routinely performs the work of the other, or, to put it more accurately, each group performs the same type of work. In these circumstances, it is submitted, it would be a recipe for a jurisdictional dispute to grant the labourers a certificate for the bargaining unit which it seeks. It was argued that it was *prima facie* inappropriate to certify another trade union for the same work for the same employer when some of the employees of the employer performing that work were already represented by another trade union. It was asserted that this was not a case of "overlapping jurisdiction" but rather a case of "synonymous jurisdiction". Counsel asserted that if the Labourers were certified for this particular unit, it would be impossible to determine which employees were covered by the existing collective agreement between the Bricklayers, Local 1 and Gottardo, and which employees were covered by the Labourers Provincial Agreement.

27. In addition to raising the spectre of numerous future jurisdictional disputes, counsel also referred to the likelihood of various sub-contracting grievances as both the Labourers and Bricklayers, Local 1 sought to ensure that the work of their members was not subcontracted to another "Gottardo" company not in contractual relations with that union. As a corollary to those arguments, counsel made several submissions which essentially focused on aspects relating to the economy and the efficiency of the respondent's operations and its continued viability in the event the Labourers were successful in being certified for its proposed bargaining unit in this application.

Decision

28. In our view the issues raised in this application are not explicitly dealt with in section 144. Similarly, we find that neither the scheme of province-wide bargaining or the designation orders made by the Minister under section 139 explicitly prohibit the Board from finding as appropriate the bargaining unit sought by the Labourers *in these circumstances*.

29. Pursuant to section 139, the Minister designates *who* the designated agents are, and assigns to those designated agents the trades which they can represent in province-wide collective bargaining in the ICI sector. In this case, the description of that "provincial unit" refers to a unit of A.B.A.'s who represent "construction labourers including masons or bricklayers' tenders, and all employees engaged in cement finishing, waterproofing or restoration work." Pursuant to section 146(1), the E.B.A. can make only one provincial agreement for that "provincial unit".

30. Pursuant to section 139, the Minister describes the "provincial units" which underlie the scheme of province-wide bargaining in the ICI sector. Pursuant to sections 6, 119 and 144, the Board describes the unit "appropriate for collective bargaining". In making that determination, the Board is limited by the collective bargaining scheme enunciated in the Act in respect of the ICI sector and the Minister's designations. Thus, for example if collective bargaining in the ICI sector can *only* take place between an E.B.A. which is designated to represent carpenters or carpenters' apprentices and its Er.B.A. counterpart, it is not "appropriate" to include in the bargaining unit employees on whose behalf the E.B.A. cannot bargain in the ICI sector such as electricians, or bricklayers and their assistants. (see *Clarence H. Graham Construction Ltd.*, *supra*). Indeed the Board has found that it is statutorily prohibited from doing that. (See *Superior Plumbing & Heating Company Ltd.*, [1986] OLRB Rep. Nov. 1589.) It would indeed be a strange result if, in the

face of the statutory scheme of provincial bargaining the Board found as "appropriate for collective bargaining" a unit of employees which included employees whom an applicant A.B.A. or E.B.A. was precluded from representing in collective bargaining by reason of the ministerial designation made pursuant to section 139. It is for that reason that the description of the bargaining unit which the Board finds appropriate, typically coincides with the designation orders made pursuant to section 139. Similarly, for those reasons the Board has consistently held that while section 6(1) of the Act gives the Board discretion in determining the unit of employees that is appropriate for collective bargaining, in the construction industry that discretion is limited by section 6(3) and section 144 of the Act. (See *Kraft Construction*, *supra*, *Reitzel Heating and Sheet Metal Limited*, [1988] OLRB Rep. Dec. 1310, *Ellis-Don Limited*, [1988] OLRB Rep. Dec. 1254, *Lay-All Drywall Ltd.*, *supra*, *Superior Plumbing & Heating Company Ltd.*, *supra*).

31. The Board in *Clarence H. Graham Construction Ltd.*, *supra*, put the matter as follows:

8. Having regard to the foregoing, it is clear that section 131a (now 144(1)) deals with both applications for certification by trade unions under the province-wide bargaining provisions of the Act, and also those trade unions not under the province-wide bargaining provisions of the Act. It deals with all possible applications for certification in the construction industry. It would follow, therefore, that whether the Board makes a finding of an appropriate unit under section 6(1) or section 6(2) of the Act, that such a finding must be made within the confines of section 131a [144], thus the Board cannot as the applicant suggests find an appropriate unit under section 131a(1) [144] and a separate appropriate unit under section 6(1) outside the purview of section 131a [144]. The Board must first deal with section 131a [144] and apply section 6 in relation to section 131a [144]. This requirement is clearly set out in section 126 [now 138] which reads as follows:

"126. Where there is a conflict between any provision in sections 127 to 136 and any provision in section 5 to 49 and 54 to 124, the provisions in sections 127 to 136 prevail".

32. We agree that we must resolve the issue as to the appropriate bargaining unit after consideration of, and application of sections 6, 119 and 144. We further concur that if there is a conflict between these provisions, section 144 will prevail. In our view however, section 144 must be given a purposive interpretation consistent with both the scheme of province-wide bargaining in the ICI sector and the other provisions of the Act. Where possible, the various provisions of the Act must be read in a manner which attempts to avoid conflicts between sections.

33. In our view, the issues raised in this application are not explicitly dealt with in section 144(1). We therefore must have recourse to the Board's general and discretionary power to describe the unit "appropriate for collective bargaining". We do not accept counsel's submissions concerning the Board's limited role in defining the appropriate bargaining unit in applications made pursuant to section 144(1). Acceptance of counsel's interpretation means that the Board has *no* authority to determine the appropriate bargaining unit in cases where the application is made under section 144(1). The Board has not in the past limited its jurisdiction in such a manner so as to merely ensure the applicant conforms with the provisions of section 144(1). In fact, and as the above noted quote from *Clarence H. Graham Construction Ltd.* indicates, the Board has taken a contrary view by stating that applications for certification in the construction industry must be dealt with having regard to both the provisions of section 144 and section 6. The Board's discretionary jurisdiction under section 6 must be exercised in the context of section 144, and the scheme of province-wide bargaining, but where, as here, section 144(1) does not explicitly cover the issue, the Board may exercise its discretionary authority under section 6.

34. Section 144 does not contain clear and specific language which prohibits the Board from granting a bargaining unit which excludes part of the trade which the appropriate A.B.A.'s and

E.B.A. have been designated to represent *in circumstances such as these*. We agree that section 144 contains mandatory language. As already noted we are also of the view that our discretion and authority to describe the unit “appropriate for collective bargaining” must be read within the context of section 144 and any other provisions of the Act, which do not conflict with section 144 or the scheme of province-wide bargaining. We also agree that fragmentation is to be avoided especially in the construction industry where representation of employees according to craft has already resulted in fragmentation of an employer’s workforce. We are of the view that section 144 is mandatory insofar as it directs E.B.A.’s and A.B.A.’s *which* employees they *must* apply for when they seek to be certified in the ICI sector. Section 144 is mandatory insofar as it does not permit an E.B.A. or A.B.A. to “pick and choose” for which part of their designated trade they will seek to be certified. A section 144(1) applicant *must* take all employees of its designated trade available to it. Similarly, section 144 is mandatory insofar as it directs the Board that the Board also cannot pick and choose which part of a designated trade it can find to be an appropriate bargaining unit. The reason why section 144 is “mandatory” in this sense and does not allow either the applicant or the Board to pick and choose who will/will not be included in a bargaining unit stems from the designation orders and the scheme of province-wide bargaining in the ICI sector. Except for certain cases of overlapping trade jurisdictions caused by the designation orders themselves, if the designated E.B.A. and its A.B.A.’s do not represent the employees whom they are designated to represent in the ICI sector, no other A.B.A. can represent those employees. To permit applicants to pick and choose who they will represent therefore, might prevent certain employees from being represented at all, and certainly denies them the option of being represented by a “craft” union or A.B.A.

35. “Mandatory” in the sense of not permitting either the Board or a section 144(1) applicant to “pick and choose” from available or possible options however, is quite different and distinct from what can be “mandatory” where there are no such possible options. In this case, the Labourers do not, at this time, have the option of choosing to represent employees currently represented by Bricklayers, Local 1. They do not have the alternative to “pick and choose” because they cannot “choose” some of the employees due to the existing bargaining rights of Bricklayers, Local 1. They can only “pick” what is available and *must* take all those available. The Board can only grant the Labourers bargaining rights for such available employees and similarly must describe the bargaining unit in such a way as to include all those available.

36. We are of the view that the interpretation which the respondent and intervener seek to place on the application of section 144 to the circumstances before us is contrary to the scheme of province-wide bargaining. Such an interpretation would effectively deprive those unrepresented employees employed by Gottcon of their right to be represented by the very A.B.A. (and E.B.A.) which the Minister has designated to represent their trade. In addition, we find the interpretation which counsel for the respondent and intervener urge upon us to be inconsistent with section 137(2). We find that section 137(2) supports our view that, in these circumstances and because the issues raised in this application are not specifically dealt with in section 144 (thereby necessitating recourse to the Board’s general jurisdiction under section 6) it is appropriate to describe the bargaining unit in the manner sought by the Labourers in this application. Notwithstanding counsels’ argument to the contrary, we find that section 137(2) supports the view that the legislature has recognized that, in certain situations, the scheme of province-wide bargaining is not, and cannot be, a monolithic super structure that encompasses or applies to *all* situations.

37. We do not agree that section 137(2) deals only with the “geographic” jurisdiction of the non-A.B.A.’s, but in any event can see no reason why a distinction should be drawn between the “geographic” jurisdiction of non-A.B.A.’s with existing bargaining rights and the “trade” jurisdiction of non-A.B.A.’s with existing bargaining rights. If an A.B.A. is precluded from obtaining bar-

gaining rights for employees in the ICI sector because a non-A.B.A. already holds bargaining rights in the "respective geographic jurisdiction" of the A.B.A., then surely a similar rationale applies where a non-A.B.A. holds bargaining rights in respect of a part of the "trade" jurisdiction of the A.B.A. In our view, if any non-A.B.A. holds bargaining rights in respect of any employees employed in the ICI sector, (absent a timely displacement application) the A.B.A. cannot acquire bargaining rights in respect of those employees either by virtue of section 144(1), or the deemed recognition of the A.B.A. by reason of section 137(2). The E.B.A. can however acquire bargaining rights for employees not represented by the non-A.B.A. with existing bargaining rights.

38. To accept counsels' assertion that section 144(1) prohibits the granting of a bargaining unit which excludes bricklayers' tenders in the circumstances of this case is also inconsistent with the principles which underlie the Act and certain policies which the Board has enunciated in furtherance of those principles. In this regard we wish to address specifically those arguments of counsel set out in paragraphs 21 and 22 herein.

39. First, we note that we do not agree that the issues raised in this application are not about the right of representation, but merely the appropriateness of this particular bargaining unit. All determinations as to the appropriateness of the bargaining unit inevitably impact upon the rights of employees to choose to be represented by a particular trade union.

40. In our view, the fact that the currently unrepresented employees *could* be represented by some other trade union (other than the applicant A.B.A.) which is not subject to the restrictions found in section 144(1) does not meet or answer the argument that the interpretation of section 144 which counsel for the respondent and the intervener urge upon this Board denies the unrepresented employees the right to be represented by the trade union of their choice. In the construction industry, the rights of employees to choose their bargaining agents are already somewhat restricted. For example, if employees want to be in a "craft" unit and represented by a "craft" union (an A.B.A.) they have a restricted right as to which "craft" union they may choose. For example, these employees could not choose to be represented by the International Brotherhood of Electrical Workers, the craft union designated to represent journeymen and apprentice electricians. In this application, these employees have indicated that they wish to be represented by a "craft" union (an A.B.A.). We can see no reason, and can find none enunciated in the statute as to why the rights of these employees to choose their bargaining agent should be further restricted by depriving the employees of the opportunity to be represented by the very A.B.A. (and E.B.A.) whom the Minister has specifically designated to represent persons employed in their trade. Further limiting the already restricted choice of these employees to trade unions who are not A.B.A.'s or E.B.A.'s, or bargaining agents who do not fall within the parameters of the scheme of province-wide bargaining in the ICI sector enunciated in the Act would not be in furtherance of the scheme of province-wide bargaining.

41. Similarly, we do not accept that the fact that the Labourers have chosen to include Gottardo as a respondent in this, and its section 1(4) application should adversely impact upon the bargaining unit description in the manner suggested by counsel. In this instance, the Labourers properly sought the section 1(4) declaration granted to them in an effort to protect against the possibility of the future erosion of their bargaining unit if work was transferred from one entity for which it holds bargaining rights to another entity for which it does not hold bargaining rights. We do not agree that either the Labourers or those currently unrepresented employees for whom it now seeks to obtain bargaining rights should be penalized because they have sought, at the front-end, to properly define the bargaining relationship and not enter into a relationship which has a substantial possibility for the erosion of the bargaining unit. In choosing to include Gottardo in its section 1(4) application, the Labourers merely exercised a statutory right to define the employer of

the employees whom they seek to represent, in a manner which lends itself to the preservation of the integrity of the bargaining unit, and in a manner which ensures that there will be direct dealings between the bargaining agent and the entity which is the "true" employer of the employees. We can see no reason, (and again can find none enunciated in the statute), why the Labourers should, in effect, be disadvantaged because it chose not to take the risk of defining the respondent in a limited manner. This is especially so when it is recognized that there is a specific statutory provision which was enacted for the very reason of eliminating, or at the very least minimizing that risk.

42. Finally, we turn to the argument which focuses on the timeliness of the application, and in which it is submitted that the rights of the unrepresented employees are not denied, but merely "delayed" or "postponed" for a brief period. First, we observe that we can find no rationale explanation why currently unrepresented employees should have their right to be represented by the trade union of their choice delayed or postponed by reason of the fact that a portion of the employers' workforce is already represented by another trade union. Although the Act specifically limits to certain specified time periods the right of employees already represented by a trade union to choose another trade union, there are no similar restrictions or prohibitions placed upon the times when unrepresented employees may choose to become represented by any trade union. (Subject only to sections 103(2)(i) or 103(3)).

43. Moreover, if we were to adopt counsel's submissions that the Board has no jurisdiction to define the appropriate bargaining unit in the manner sought by the Labourers in this application, then we don't have such jurisdiction at any time. Yet, if we were to accept that the Labourers *must* apply for, and the Board can only grant, the Labourers its "standard" bargaining unit, it would lead, in our view to certain absurd and untenable results. To find that an A.B.A. cannot obtain bargaining rights for the unrepresented "part" or "sub-set" of the trade it is designated to represent because another trade union already holds bargaining rights for another "part" or "sub-set" of the trade would be disruptive of the scheme of province-wide bargaining in the ICI sector. The designation orders made by the Minister pursuant to section 139 of the Act are not watertight compartments. There are instances of an overlap in the designation orders themselves. Acceptance of counsel's submissions would mean that an A.B.A. which has been statutorily designated to represent a trade could never represent that trade if, for example, an employer voluntarily recognized another trade union. The same would be true if another A.B.A. whose designation order overlaps with the applicant A.B.A.'s designation order had already acquired bargaining rights for that part of the trade which it was also designated to represent. The race would always go to the swiftest. Voluntary recognition by an employer in respect of some "part" of the trade, or representation by another A.B.A. in respect of that overlapping part of the trade which it is also designated to represent would oust the right of an applicant A.B.A. to be certified on behalf of the remainder portion of the trade which was unrepresented and which it is statutorily designated to represent. That could potentially leave the unrepresented segment of the trade unrepresented ad infinitum.

44. This then leads to counsel's arguments outlined in paragraph 20 that the Labourers must wait for the "open period" of the Bricklayers agreement and then apply for its standard bargaining unit of all construction labourers.

45. If we were to accept such a proposition, it could have a significant adverse impact upon the existing bargaining rights of Bricklayers, Local 1. We say this because we are of the view that counsel's submissions that the Labourers can only apply for a bargaining unit which includes *all* construction labourers (including the bricklayers' tenders represented by Bricklayers, Local 1) during the open period is inconsistent with the Board's long standing policy that a trade union should not be deprived of the bargaining rights it has acquired unless a vote is conducted among the

employees whom it represents and a majority of those employees have expressed their view that they no longer wish to be represented by the incumbent trade union.

46. As the Board noted in *Reitzel Heating & Sheet Metal Ltd.*, *supra*:

39. First, we are of the view, and it has long been the policy approach of the Board that an incumbent trade union should not be deprived of the bargaining rights it has acquired unless a vote is conducted *among the employees whom it represents*, and a majority of *those* employees have expressed their wish that they no longer wish to be represented by the incumbent. For this reason the Board has not, in the past, permitted a raiding union to "enlarge" the bargaining unit and displace an incumbent solely on the strength of its support in the "enlarged" or "add-on" portion of the unit.

40. The policy and rationale of the Board in this regard was followed and succinctly summarized by the Board in *Toronto East General and Orthopaedic Hospital Inc.* [1981] OLRB Rep. Feb. 225.

9. Where there is a request for a pre-hearing representation vote on a displacement application, the Board's standard practice is to require the applicant to accept as a voting constituency the bargaining unit represented by the incumbent union. (See, for example, *Ethyl Canada Inc.* [1979] OLRB Rep. Oct. 985; *The Wellesley Hospital* [1976] OLRB Rep. Feb. 45; *Roland Lefebvre Lathing Limited* [1966] OLRB Rep. May 140.) If the applicant seeks to enlarge the bargaining unit the Board will establish two voting constituencies, the incumbent unit as one and the add-one segment as the other. To be entitled to a vote in each, the applicant must demonstrate membership support of 35 per cent in each voting constituency. (See *Ethyl Canada Inc.*, *supra*).

• • •

14. In considering a displacement application for certification the Board has to be sensitive to the existence of an established bargaining relationship. The Board's practice of requiring the applicant to "'take' what the incumbent has" emanates from the belief *that the employees in an existing bargaining unit should alone decide, as a separate group, whether they want to change bargaining agents.* In *Toronto Star Limited*, [1974] OLRB Rep. July 416 the vice-chairman, in his dissent on another point, explained the rationale supporting the Board's general practice. At p. 417 he said,

The reason for holding as appropriate the bargaining unit described in the scope clause of a collective agreement in a displacement application is because of the continued viability of the community of interests of employees affected by the application. It would be contrary to the efficacy of a past history of viable collective bargaining to upset the integrity of that bargaining unit without first soliciting the views of the employees affected.

15. In *Barnet-McQueen Co. Ltd.*, 59 CLLC 26 18,139 the Board was asked by the displacing union to find that a unit larger than the incumbent's unit was appropriate. The Board refused the request explaining that if it were to find a larger unit appropriate it would be possible for a union to displace another solely through its strength in the add-on portion of the unit and despite the views of the employees in the original or incumbent's unit.

We note parenthetically that it is for this reason that the Board has *always* ordered a representation vote before terminating the bargaining rights of any trade union.

47. In this case, if the Labourers were to apply during the open period for a unit of all construction labourers including those employees employed by Gottardo and currently represented by Bricklayers, Local 1, and filed with the Board membership evidence on behalf of at least fifty-five percent of the employees of *that* unit, the Bricklayers, Local 1 could lose the bargaining rights it

has notwithstanding the fact that a vote was not conducted, or for that matter notwithstanding that a majority of its members did not become members of the Labourers or support the Labourers' application to be certified (the fifty-five percent support level having perhaps been achieved through the numerical strength of the unrepresented employees on their own, or in combination with a minority of employees represented by Bricklayers, Local 1).

48. If the Board were to conduct a vote, the vote must be a vote of employees in the bargaining unit. According to the submissions of counsel for the respondent and intervener that bargaining unit must be a "global" unit and must include all construction labourers of the respondent, including those currently represented by Bricklayers, Local 1. If, on the taking of that representation vote, the Labourers had the support of the majority of the employees in this all encompassing construction labourers bargaining unit, section 7(3) and 144(2) dictates that the Labourers *must* be certified as bargaining agent. This will be so regardless of the fact that the majority support may have been achieved only because the Labourers had the support of the currently unrepresented employees and perhaps, notwithstanding the fact that the Labourers did not have any support, or only minimal support, among the employees currently represented by Bricklayers, Local 1. That result would be contrary to the Board's long standing policy that a trade union should only be deprived of its bargaining rights by a majority vote conducted amongst the employees it represents.

49. The Board could perhaps conduct two votes. The first, amongst employees currently represented by the Bricklayers, Local 1 and a second amongst the currently unrepresented construction labourers. The Board could perhaps count the votes sequentially. Only if a majority of the employees currently represented by Bricklayers, Local 1 voted in favour of the Labourers would the balance cast by the employees currently unrepresented be counted. As is noted by the Board in *Reitzel Heating & Sheet Metal Ltd.*, *supra*, however, there is some doubt that the Board has the jurisdiction to conduct or count such a vote in such a manner. (See paragraph 44 of the decision). In addition, and again as noted in *Reitzel Heating & Sheet Metal Ltd.*, *supra*, as a matter of principle, employees not currently represented by the Bricklayers, Local 1 should not be disenfranchised by reason of the result of the vote by the employees who are represented by Bricklayers, Local 1. Their right to have the ballots they cast counted should not be dependent on how other employees vote.

50. More significantly however, if the Board is without jurisdiction to describe a bargaining unit in terms which exclude "part" of the Labourers' designated trade because that part is already represented by another trade union, then neither the timing of the Labourers' application or the conduct and/or sequential counting of two votes would give the Board that jurisdiction. Thus, if a majority of the employees currently represented by Bricklayers, Local 1 voted against the Labourers, preferring instead to be represented by Bricklayers, Local 1, the Board would not terminate the bargaining rights of Bricklayers, Local 1. In that instance, acceptance of counsel's submissions would therefore mean that the currently unrepresented employees could *never* choose to have the Labourers as their bargaining agent because, according to counsel, as long as Bricklayers, Local 1 represents some part of the construction labourers of the respondent so that the Labourers cannot take all of their designated trade, they cannot be certified for something less. If in the present situation the different parts of the trade were represented by two or more different trade unions (if for example, employees engaged in cement finishing were represented by another trade union while the bricklayers' tenders were represented by Bricklayers, Local 1) and were covered by collective agreements which contained different open periods, each of the problems outlined in the above scenarios would be exacerbated.

51. We wish also to address counsel's arguments in respect of both section 146 and the

phrase "the unit of employees shall include all employees who would be bound by a provincial agreement" as found in section 144(1).

52. Employees can only be in one bargaining unit at a time, and there can only be one exclusive bargaining agent in respect of that bargaining unit. Employees may be in different bargaining units and may move back and forth between bargaining units at different times, but that employee cannot be in two different units at the same time. (See *Laurent Lamoureux Company Ltd.*, [1985] OLRB Rep. Nov. 1618 at paragraph 15, *Wraymar Construction & Rental Sales Ltd.*, [1989] OLRB Rep. June 682, *Harnden & King Construction Ltd.*, [1987] OLRB Rep. Dec. 1510). In both the construction and non-construction settings (and regardless of the specific provisions relating to provincial bargaining of one provincial agreement in the ICI sector), the Act specifies that there can only be one collective agreement with respect to the employees in the bargaining unit defined in the collective agreement (section 49). It follows therefore that an employee in the bargaining unit to which a collective agreement applies can only be covered by that collective agreement, and can only be represented by one trade union in respect of the work covered by that collective agreement. (That does not mean that there can't be two collective agreements covering the same work. The number of jurisdictional disputes which have been filed with this Board unfortunately attest to the fact that it is not uncommon in the construction industry for collective agreements to have overlapping work jurisdiction clauses). An employee who is already represented by an exclusive bargaining agent (in this case Bricklayers, Local 1), and who is already covered by an existing collective agreement (the Bricklayers Local 1 collective agreement with Gottardo) for work which is also covered by another agreement (in this case the provincial agreement) *cannot, at the same time*, be represented by another trade union (the Labourers) and cannot at the same time, be covered by that other agreement in respect of that work. Those employees would therefore *not* be bound by the provincial agreement and therefore cannot be included in "the unit of employees ... who would be bound by a provincial agreement."

53. We do not agree that the granting of a bargaining unit description in the terms sought would create two provincial agreements contrary to section 146. In our view, there will still only be one provincial collective agreement "affecting employees represented by affiliated bargaining agents". That provincial collective agreement would obviously not apply to those employees *not* represented by the affiliated bargaining agent applicant in this case. That fact however, does not change the matter that there is still only one collective agreement applicable to all employees *represented by the Labourers*. By reason of statute, upon certification, this respondent will be bound to the provincial collective agreement negotiated between the Er.B.A. and the Labourers in respect of the employees *for whom the Labourers hold bargaining rights*.

54. Finally, we note that this is not a case of first impression. The Board has, on other occasions, either upon agreement of the parties (although without analysis) or after hearing the submissions of the parties, described the bargaining unit in the ICI sector in such a manner as to "save and except" employees already represented by another trade union (see for example the decisions of the Board in the *Corporation of the City of Toronto*, Board File 1172-85-R released September 9, 1985 and Board File 1679-87-R released December 23, 1987.)

55. In *Georgian Building Corporation*, [1981] OLRB Rep. March 275, the Board dealt with an argument substantially similar to the one made in this case. In that instance, Local 183 of the Labourers International Union of North America (Local 183) was found to have existing bargaining rights for employees of the respondent employer in the residential sector of the construction industry in Board area 8 only. Local 183 did not have bargaining rights for the ICI sector or any other sector except the residential sector. At paragraphs 21 and 22 of that decision, the Board outlined the respective positions of the parties:

21. Counsel for the respondent argued that since Local 183 has bargaining rights for some of the construction labourers of the respondent in Board Area #8 pursuant to subsisting collective agreements, Local 506 cannot apply under section 131a(1) [now section 144] for a unit which includes all employees who would be bound by a provincial agreement together with *all* other employees in Board #8. He further argued that neither of the exceptions specified in that subsection ("unless such bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition") was applicable in the instance case. Accordingly, he submitted that no certificate could be issued to be applicant in the present case. It was his position that a province-wide certificate in respect of the respondent's employees in the industrial, commercial and institutional sector could only be obtained through a section 131a(1) [144] application pertaining to an "appropriate geographic area" in which no bargaining rights had previously been obtained by any trade union in respect of any of the respondent's employees in any of the other sectors in that geographic area (unless bargaining rights had been obtained for all employees in all other sectors in that area by voluntary recognition or by certificate issued under section 131a(3) [144(3)]). In the alternative, he submitted that the Board should issue a certificate only in respect of the respondent's employees in the industrial, commercial and institutional sector (province-wide).

22. Counsel for the applicant contended that the Board should not construe section 131a [144] of the Act in a manner which could preclude some of the employees of an employer in a Board area from ever being represented by a trade union through a certification application. He noted that if the respondent's interpretation of section 131a [144] were accepted, the Board could not certify where an employer employs persons in the industrial, commercial and institutional sector and in other sectors in a Board area and a trade union holds bargaining rights in some but not all other sectors. Thus, (he submitted) the employees in the remaining sectors would "remain forever unrepresented" (unless the employer granted voluntary recognition with respect to them). He submitted that the bargaining rights currently held by Local 183 (in respect of employees of the respondent in Board Area #8) under existing collective agreements should be treated as either having been acquired by voluntary recognition (since the recognition clause in a collective agreement supersedes any certificate issued by the Board) or should be "deemed" to have been acquired under section 131a(3) [144(3)] since it is the provision under which Local 183 would have obtained bargaining rights if that subsection had been in force at the time Local 183 was certified in respect of them.

56. After referring to both provisions of the *Interpretation Act* and the preamble to the Act, the Board concluded:

Having regard to those legislative provisions, the Board cannot accept the construction of section 131a [144] advocated by counsel for the respondent. Harmonious relations between employers and employees would not be furthered, nor would the practice and procedure of collective bargaining be encouraged by that construction which would preclude certification in respect of some employees who would not otherwise be beyond the purview of the certification procedures under the Act. Such an interpretation might well result in resurgence of recognition strikes, the elimination of which is one of the purposes of the certification procedures of the Act. The Board has a well-known and long standing practice of preserving existing bargaining rights by excluding from bargaining units employees covered by subsisting collective agreements. In the absence of a clear and specific legislative direction to the contrary, the Board is of the view that it is appropriate, having regard to the preamble and the general scheme of the Act, to maintain that practice which promotes industrial peace and stability by recognizing and preserving existing bargaining rights.

57. The Board ultimately granted two certificates to the applicant in respect of all construction labourers in the employ of the respondent employer in both the ICI sector and in all other sectors of Board Area 8 and excluded from each of those certificates "persons covered by subsisting collective agreements, certificates of the Labour Relations Board or written voluntary recognition agreements."

58. For all of these reason, and in light of the fact that section 144 does not contain clear and specific language which prohibit us from doing so, we have determined that the Board can

describe the appropriate bargaining unit in a manner which excludes a "part" of the trade which the Labourers are designated to represent where, as here, that "part" of the trade is already represented by another trade union.

59. The final issue to be resolved therefore is whether, in these circumstances, the Board *should* grant such a bargaining unit.

60. In respect of counsel's submissions that the proposed unit unduly fragments the employer's workforce we merely note that such fragmentation has already occurred. At least since 1985, the respondent has taken, what it has sought to characterize as its homogeneous, fully integrated, totally interdependent workforce and fragmented it into two groups of employees. The first group consists of those employees to whom the respondent applies to the Bricklayers, Local 1 collective agreement and on whose behalf it deducts and subsequently remits dues and other fees to the Bricklayers, Local 1. The second group of employees consists of those to whom the respondent has never applied the Bricklayers, Local 1 collective agreement. Indeed, the respondent's fragmentation has extended so far that it has developed an internal accounting procedure which it uses to account for the services provided to the various companies in the Gottardo group of companies by each of these two groups of employees. The existing fragmentation has apparently not caused the respondents any concern or undue hardship in the administration of its labour relations in the past four years. Under these circumstances, we find it inappropriate to place undue emphasis on the fragmentation of the respondent's workforce. Undoubtedly, if the Labourers are at some point certified for this second group, the respondent may have to make certain adjustments to its methods of operation. That however, is not unusual. There are many instances in which, once an employer is bound to recognize a trade union after certification of a previously unrepresented group of employees, the employer has to make adjustments to its methods of operation or otherwise adapt to the fact that its employees are represented and subject to a collective agreement. (See *Shearwall Forming (East) Ltd.*, Board File 3168-88-R decision released December 6, 1989 and *Ridsdale Steel Fabricators Inc.*, [1987] OLRB Rep. April 601 for similar observations in another setting).

61. With regard to the issues of the economy, efficiency and the likelihood of numerous jurisdictional disputes, we are of the view that although those matters should be considered by the Board in determining whether a bargaining unit is appropriate, the Board should not be unduly affected by the respondent's arguments in this case. Certainly, some of the respondent's assertions as to what will happen in the future if the Labourers are certified for the unit it seeks are speculative. In exercising our discretion to determine the appropriate bargaining unit we must weigh and balance the competing interests of the parties before us. The economy and efficiency of an employer's operation can be no more determinative of the appropriate bargaining unit, than can a trade union's desire to be certified for what it wants because that configuration may ensure that it is successful in the application, or may give it greater bargaining strength or make it less difficult for the union to organize. As the Board noted in the *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266 at page 271:

The structures and policies that promote a maximization of the employer's business interests are not those that will necessarily describe a viable bargaining unit, or the only viable bargaining unit - particularly since those interests may include a desire to avoid collective bargaining altogether, or limit its effectiveness. The employer's administrative structures are relevant in determining the bargaining unit, but they are not necessarily to be taken as the conclusive blue print in deciding what is appropriate. Nor is it a matter of simply giving an applicant union what it wants. It is, as we have noted, a matter of balancing competing considerations ...

(See also *Westdale Painting & Decorating*, [1989] OLRB Rep. Sept. 984 and *Shearwall Forming (East) Ltd. supra.*)

62. After consideration of all of the submissions, we have determined that it is appropriate to describe the bargaining unit in the manner sought by the Labourers. We therefore find that:

all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry, in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, and those masons' or bricklayers' tenders in bargaining units for which any trade union held bargaining rights as of January 27, 1989, and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and those masons' or bricklayers' tenders in bargaining unit for which any trade union held bargaining rights as of January 27, 1989

constitute a unit of employees of the respondent appropriate for collective bargaining.

63. We have not addressed, and find it unnecessary to address at this stage of these proceedings the submissions of the parties as to which employees fall outside the scope of the bargaining unit by reason of the "save and except" provision in the bargaining unit description. Resolution of that issue may ultimately involve an examination of the bricklayers' agreement to determine which employees and/or what work is covered by that collective agreement. In the present context however that matter does not need to be addressed in this decision. Indeed, it may be that such issue need not be determined at all in the context of these proceedings if the parties find that they are in agreement in respect of the list of employees in the bargaining unit.

64. This decision does not however dispose of this application. The list of employees in the bargaining unit (which we have now determined appropriate) on the date of application must still be settled, and we must still determine how many of those employees were members of the applicant union at the relevant time.

65. The Registrar is therefore directed to schedule this matter for hearing to hear the evidence and representations of the parties with respect to all remaining matters arising out of and incidental to this application.

2352-89-R Canadian Paperworkers Union, Applicant v. Grant Industries Corp. and Grant Forest Products Corp. c.o.b. as Grant Forest Products, Respondent v. Grant Forest Products Employee's Association, Intervener

Bargaining Unit - Certification - Practice and Procedure - Pre-Hearing Vote - Displacement application for pre-hearing vote for unit broader than held by incumbent - Board practice in such situations to establish two voting constituencies of incumbent unit and add-on segment - Applicant union must have requisite support in each voting constituency to be entitled to a vote in each - Board directing vote in two separate constituencies

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *R. M. Sloan* and *C. McDonald*.

DECISION OF THE BOARD; January 26, 1990

1. The title of this proceeding is amended to describe the respondent as: "Grant Industries Corp. and Grant Forest Products Corp. c.o.b. as Grant Forest Products".

2. This is an application for certification in which the applicant has requested that a pre-hearing representation vote be taken.

3. In the most recent collective agreement between the respondent and the intervener, the respondent recognizes the intervener as the sole collective bargaining agent of

all employees engaged in the plants and yard of the Company's operations at Englehart, save and except foremen, those above the rank of foremen, office, clerical, sales staff, students, or any salaried, part-time or temporary employees.

4. In accordance with the usual practice, a Labour Relations Officer was authorized to and did confer with the applicant, the respondent and the intervener ("the participants") with respect to the issues in this application. As a result of her conference with them, the Labour Relations Officer reports that the participants agree that the appropriate bargaining unit ("the proposed unit") for the purpose of this application should be described as:

all employees of the respondent in the Town of Englehart, save and except foremen, persons above the rank of foreman, office, clerical & sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

They say this is the unit for which the applicant should be certified if it succeeds in a pre-hearing vote. This unit differs from that described in the intervener's agreement with the respondent in that "salaried" and "temporary" employees are not excluded. The participants agree that on the application date there were no "salaried" employees who would not otherwise be excluded by the description purposed. As of the application date, there were, however, six "temporary" employees not covered by the intervener's agreement with the respondent who would fall within the bargaining unit description on which the participants have agreed. "Temporary" employee is defined this way in Article 6.03 of the most recent collective agreement:

6.03 ...

- (c) Temporary: Employees up to a maximum of three months. This is subject to review and approval by Management and Association Committee for extension of time. If an extension of time is requested by the Company, the Association may grant up to a maximum of 30 days at which point the employees status will again be subject to review.

5. When determining the bargaining unit appropriate for collective bargaining, the Board is loath to draw distinctions between employees based on the method by which they are paid: *Duplate Canada Ltd.*, 60 CLLC ¶16,169; *Kraft Foods Limited*, [1967] OLRB Rep. Oct. 680; and, *University of Ottawa*, [1986] OLRB Rep. Mar. 353. For that reason, the elimination of the "salaried" distinction is a desirable goal. The exclusion of employees defined as "temporary" by Article 6.03 of the collective agreement is not something the Board would ordinarily do in fashioning a bargaining unit in an unorganized workplace, but probably would be accepted in a displacement situation where, as here, that exclusion has developed through collective bargaining between the employer and an incumbent trade union.

6..As the Board observed in *Taiga Trucking (Ontario) 1980 Inc.*, [1987] OLRB Rep. Nov. 1433:

5. Our function at this stage is to make the determinations contemplated by subsection 9(2) of the Act. We do not determine the appropriate bargaining unit or assess the weight to be given

to the applicant's membership evidence. As appears from subsection 9(4) of the Act, those matters are only decided after the vote is conducted, when all interested persons will be notified in Form 71 of the contents of the Returning Officer's report and of their opportunity to make representations and have a hearing before the Board with respect to any issue affecting the certification application or the pre-hearing representation vote. Indeed, at this stage the Board does not attempt to resolve any dispute about its constitutional jurisdiction (*Kenting Earth Sciences Limited*, [1985] OLRB Rep. Feb. 293) or the applicant's "trade union status" (*Emery Industries Limited*, *supra*) or the identity of persons employed in any proposed bargaining unit at any relevant time (*The Board of Education for the City of North York*, [1984] OLRB Rep. July 989), or the application of subsection 1(4) of the Act (*Satin Finish Hardwood Flooring (Ontario) Limited*, [1984] OLRB Rep. Nov. 1062). These and any other issues affecting whether and how the results of a pre-hearing vote should affect the disposition of the application for certification are only resolved *after* any such vote is conducted.

6. While we do not resolve such issues at this stage, we do need to know the immediate parties' positions on any issue which could affect the use to which the results of a pre-hearing representation vote may later be put. This is so that a meaningful voting constituency or constituencies can be struck and appropriate directions made concerning segregation of ballots cast by individuals or groups whose inclusion in or exclusion from the appropriate unit or units is in dispute. A pre-hearing vote is of little use unless one can later reconstruct from it a vote of the employees in the unit ultimately found appropriate by the Board. Accordingly, when an applicant requests a pre-hearing vote, the Board's practice is to authorize one of its Labour Relations Officers to examine the records of the applicant and of the respondent and to confer with the parties as to the description and composition of the appropriate bargaining unit, the description and composition of the voting constituency or constituencies, the list of employees as of the terminal date for the purposes of any vote which might be directed and all other matters relating to entitlement to and arrangements for such a vote, and to report to the Board thereon.

7. Where an applicant requesting a pre-hearing vote has applied for a unit which includes but is broader than the unit represented by the incumbent, the Board's usual practice is as described in paragraphs 9 and 10 of its decision in *Toronto East General and Orthopaedic Hospital Inc.*, [1981] OLRB Rep. Feb. 225:

9. Where there is a request for a pre-hearing representation vote on a displacement application, the Board's standard practice is to require the applicant to accept as a voting constituency the bargaining unit represented by the incumbent union. (See, for example, *Ethyl Canada Inc.*, [1979] OLRB Rep. Oct. 985; *The Wellesley Hospital*, [1976] OLRB Rep. Feb. 45; *Roland Lefebvre Lathing Limited*, [1966] OLRB Rep. May 140.) If the applicant seeks to enlarge the bargaining unit the Board will establish two voting constituencies, the incumbent unit as one and the add-on segment as the other. To be entitled to a vote in each, the applicant must demonstrate membership support of 35 per cent in each voting constituency. (See *Ethyl Canada Inc.*, *supra*).

10. After a pre-hearing representation vote has been taken the Board determines the appropriate bargaining unit. Normally the bargaining unit found to be appropriate in a displacement situation is the incumbent's bargaining unit. The Board may amend the unit, however, in the event the applicant wins [the] vote, or votes if more than one voting constituency has been established. (See *Roland Lefebvre Lathing Limited*, *supra*.) In *Wellesley Hospital*, *supra*, however, the Board refused the company's request to carve out of the incumbent's unit a group of employees. The Board expressed the view that when an applicant wins a displacement vote it is at least entitled to the same unit as was represented by the incumbent union.

It is fundamental, of course, that all those employed at the relevant time in a bargaining unit for which certification may be granted be given the opportunity to participate in a representation vote if that is the means by which that application is to be determined.

8. The participants told the Labour Relations Officer that the voting constituency for the purpose of a pre-hearing representation vote should correspond with the unit described in the most recent collective agreement between the respondent and the intervener. They contemplate a ballot

in which voters are asked whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent. The difficulty with that is that the respondent did employ temporary employees on the application date. We do not know whether there will be any eligible to vote. If there are, their wishes must be considered in a vote if there is to be any prospect of certification for a unit which includes such employees.

9. Accordingly, we determine that there should be two voting constituencies:

Voting constituency #1

all employees engaged in the plants and yard of the Company's operations at Englehart, save and except foremen, those above the rank of foremen, office, clerical, sales staff, students, or any salaried, part-time or temporary employees.

Voting constituency #2

all employees of the respondent in the Town of Englehart, save and except foremen, persons above the rank of foreman, office, clerical & sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period and those employed in voting constituency #1.

10. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in each of the voting constituencies were members of the applicant at the time the application was made. We therefore direct that a pre-hearing representation vote be conducted in each of those constituencies.

11. All those employed in voting constituency #1 on January 11, 1990 who are so employed on the date the vote is taken will be eligible to vote in that voting constituency. Voters in voting constituency #1 will be asked to indicate whether they wish to be represented by the applicant or by the intervener in their employment relations with the respondent.

12. All those employed in voting constituency #2 on January 11, 1990 who are so employed on the date the vote is taken will be eligible to vote in voting constituency #2. Voters in voting constituency #2 will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

13. If there is a dispute about whether an employee should vote in voting constituency #1 or voting constituency #2, he or she shall be permitted to mark a ballot in each vote and both ballots shall be segregated and not counted.

14. The matter is referred to the Registrar.
-

0591-89-R; 0592-89-R Canadian Union of Public Employees, Applicant v. **The Hamilton-Wentworth Roman Catholic Separate School Board Professional Staff Association**, Respondent v. Group of Employees #1, Objectors; Canadian Union of Public Employees, Applicant v. **The Hamilton-Wentworth Roman Catholic Separate School Board Professional Staff Association**, Respondent v. Group of Employees #2, Objectors

Union Successor Status - Bargaining Unit - Board having no jurisdiction to amend bargaining unit description - Board jurisdiction confined to declaration of successor status with all rights, privileges, and duties of predecessor, or dismissal of application - Carving out of separate unit for technicians inappropriate in any event since objections unrelated to union merger - Declaration of union successor status issuing

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *R. M. Sloan* and *K. Davies*.

DECISION OF THE BOARD; January 17, 1990

1. These are two applications under section 62 of the *Labour Relations Act* in which the applicant requests a declaration that it has acquired the rights, privileges and duties of the Hamilton-Wentworth Roman Catholic Separate School Board Professional Staff Association ("the Association"). Board File 0591-89-R deals with a unit of clerical, technical and office employees described by the parties as bargaining unit #1. Board File 0592-89-R refers to a unit of educational assistants and professional support staff described by the parties as bargaining unit #2. Each bargaining unit is covered by a collective agreement between the Association and the Hamilton-Wentworth Roman Catholic Separate School Board expiring December 31, 1989.

2. On December 11, 1989, this matter came up for hearing and the Board issued the following oral decision:

After reviewing the submissions and the material filed, we declare that pursuant to section 62, the Canadian Union of Public Employees has acquired the rights, privileges and duties under the *Labour Relations Act* of The Hamilton-Wentworth Roman Catholic Separate School Board Professional Staff Association.

We now provide our reasons.

3. At the time of this application, there was no dispute that the two bargaining units were represented by the Association. On April 4, 1989, at a general meeting provided for by the constitution of the Association, a motion was passed to have the president of the Association take the necessary steps to call a meeting to take a vote on whether the Association should affiliate with the Canadian Union of Public Employees ("CUPE"). Although it is not clear what was meant by the word "affiliate", notice of a special meeting was then sent out in accordance with the constitution, specifying the purpose of the meeting and attaching a copy of a proposed motion "to affiliate, merge, amalgamate or transfer its (the Hamilton-Wentworth Roman Catholic Separate School Board Professional Support Staff Association) jurisdiction, rights, privileges, duties, with or to the Canadian Union of Public Employees".

4. The special meeting was held on April 18, 1989 and the motion was passed by more than the two-thirds majority required by the Association's constitution. Subsequently, the Association and CUPE executed an agreement which provided that the Association joined CUPE, that it ceased to exist as a separate organization, and that its jurisdiction was transferred to CUPE. The

material before us indicates that this sequence of events conformed to the constitutions of both the Association and CUPE. On April 20, 1989, Mr. William Brown, a representative of CUPE, wrote to the Hamilton-Wentworth Roman Catholic Separate School Board to advise it that the Association had transferred its jurisdiction to the CUPE and requesting a meeting to discuss the matter. Subsequently, the current applications were filed.

5. The applicant characterized what had occurred as a transfer of jurisdiction from the Association to CUPE. Having regard to the Board's jurisprudence in this regard, we find it more accurate to consider this sequence of events as a merger or an amalgamation of the Association with CUPE. While the motion passed was not specific, having regard to the subsequent agreement between CUPE and the Association and in particular, the fact that the Association ceased to exist as a separate organization, it appears to us that a merger or amalgamation occurred.

6. The applications were set down for hearing because a group of employees filed an objection in each application. Counsel for Group of Employees #2 advised the Board at the commencement of the hearing that his clients' concerns had been resolved and that any objections they might have had were withdrawn.

7. Charles Milazzo and Tony F. Vario spoke on behalf of Group of Employees #1. They did not contend that there was anything improper or defective in the manner in which the merger or amalgamation had taken place. Rather, they indicated their concern was that the audio-visual technicians whom they represented were grossly outnumbered by the office and clerical staff, that they had never wished to be part of the Association's bargaining unit and did not wish to continue in the bargaining unit to be represented by CUPE. They volunteered that they had not signed any form or union card when the Association was formed and indicated that they would prefer to be part of a bargaining unit of caretakers and tradesmen employed by the Hamilton-Wentworth Roman Catholic Separate School Board. In essence, they asked us to carve the audio-visual technicians out of bargaining unit #1.

8. Section 62 provides as follows:

62.-(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

(2) Before issuing a declaration under subsection (1), the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.

(3) Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

9. In our view, our jurisdiction under section 62 is quite limited. Unlike section 63, which specifically empowers the Board to define the composition of bargaining units and amend bargaining unit descriptions in certificates or collective agreements, section 62 provides only that the Board may declare that the successor has or has not acquired the rights, privileges and duties of the predecessor, or the Board may dismiss the application. While the Board may do certain things under section 62(2) to arrive at that conclusion, there is no provision to amend a bargaining unit in a current collective agreement. The contrast with section 63 is quite striking in this regard. It

appears to us that section 62 contemplates a successor union acquiring the rights, privileges and duties of the predecessor intact, and without amendment by the Board. As the Board said in *Deseronto Public Utilities Commission*, [1977] OLRB Rep. April 248:

We feel it is worth stressing at this point that a declaration under section 54 [now section 62] has no greater effect than to substitute one union for another in a bargaining relationship. The bargaining rights and privileges possessed by the successor union are no greater than, or different from, the rights and privileges formerly possessed by the predecessor union.

10. In this case, those rights and duties involve bargaining rights and responsibilities with respect to the specific bargaining units set out in two collective agreements between the Association and the Hamilton-Wentworth Roman Catholic Separate School Board. CUPE inherits those collective agreements and those bargaining units as they are, and the Board is not at liberty to make the kind of adjustment requested here.

11. In any event, if we do have the power to carve out the audio-visual technicians from bargaining unit #1, we would not be inclined to do so in this case. It was evident that the concerns of these employees were not at all related to the merger between the Association and CUPE, but rather to their inclusion in the bargaining unit at all. This situation has apparently existed since 1985, and is not a product of the sequence of events before us. It is evident that the concerns raised by the audio-visual technicians are essentially irrelevant to the question before us, that is, whether there has been a merger, amalgamation or transfer of jurisdiction between the Association and CUPE. It makes good sense to us that a successor union acquires the bargaining unit represented by its predecessor, in a manner analogous to a displacement application for certification in which the applicant will usually be required to accept the contours of the existing bargaining unit. Moreover, while we have some sympathy for the position of Mr. Vario and Mr. Milazzo, the fact is that the *Labour Relations Act* generally contemplates a scheme of "majority rule" in labour relations. Bargaining units will often encompass a variety of different employees, and there will frequently be minority interests involved, both permanently with respect to a particular group of employees and temporarily in regard to a specific issue. As a result, we were not prepared to accede to the audio-visual technicians' request. We did, however, point out to them that CUPE and the employer were free to amend the bargaining unit description should they so desire, and that CUPE had certain obligations to them contained in section 68 of the *Labour Relations Act*.

12. As a result of our finding that the Association had merged or amalgamated with CUPE, we declared that CUPE had acquired the rights, privileges and duties under the *Labour Relations Act* of the Hamilton-Wentworth Roman Catholic Separate School Board Professional Staff Association.

1944-89-R I.U.O.E. Local 796, Applicant v. Hiram Walker & Sons Limited, Respondent v. Canadian Union of Operating Engineers & General Workers - Local 100, Intervener

Bargaining Rights - Bargaining Unit - Certification - Trade union in displacement application agreeing with employer and previous union to unit smaller than that represented by previous union - Other union retaining bargaining rights for residual categories of employees not covered by application - No employees currently in such categories - No indication of abandonment by other union - Certificate issuing

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *W. N. Fraser* and *D. A. Patterson*.

DECISION OF THE BOARD; January 25, 1990

1. No statement of desire to make representations has been filed with the Board within the time fixed under subsection 2 of section 70 of the Board's Rules of Procedure following the taking of the pre-hearing representation vote pursuant to the Board's direction of November 27, 1989.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* ("the Act").
3. The applicant, respondent and intervener ("the participants") agree that the unit described in the application, namely:

all stationary engineers and persons primarily engaged as their helpers employed by the respondent at its power house in the City of Windsor, save and except chief engineer, persons above the rank of chief engineer, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period,

is the unit of employees of the respondent appropriate for collective bargaining in this application.

4. The most recent collective agreement between the respondent and the intervener provides as follows:

1. UNION RECOGNITION

The Employer hereby recognizes the Union as the sole labour organization representing the Employer's employees at its Walkerville power plant except the Chief Engineer and persons of or above the rank of Chief Engineer as excluded by the Ontario Labour Relations Act, and agrees to treat and negotiate with the Union as the sole and exclusive bargaining agency for and on behalf of such employees.

This description appears to cover 3 categories of employee at the respondent's Walkerville power plant which are not embraced by the description set out in paragraph 3:

- (a) employees other than stationary engineers and persons primarily engaged as their helpers;
- (b) persons regularly employed for not more than 24 hours per week; and
- (c) students employed during the school vacation period.

Although the participants agree that no-one was actually employed in any of these categories as of both the application date and the terminal date, there is no indication that the intervener has aban-

done or undertaken to abandon its apparent right to represent those who might at some future time become so employed. Having regard to subsection 56(1) of the Act, the granting of a certificate to the applicant with respect to the unit described in paragraph 3 would not terminate such rights.

5. It is most unusual to fragment an existing unit in this way, and we would not ordinarily do so except on agreement of the employer and the applicant and incumbent trade unions. We assume that the participants understand the apparent consequences of their agreement and made it knowing of some circumstances which warrant or mitigate those consequences.

6. Accordingly, we find that the unit described in paragraph 3 above is a unit of employees of the respondent appropriate for collective bargaining in this application.

7. We are satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

8. On the taking of the pre-hearing representation vote directed by the Board, more than fifty per cent of the ballots cast were cast in favour of the applicant.

9. A certificate shall issue to the applicant.

10. The Registrar shall destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

2468-88-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Inzola Construction (1976) Limited**, Respondent v. Group of Employees, Objectors

Certification - Construction Industry - Petition - Reconsideration - Union leading evidence showing sole petitioner had lied during evidence at certification application - Credibility critical in one-person petition - Union satisfying criteria of new evidence and due diligence - Certificate issuing

BEFORE: *S. A. Tacon*, Vice-Chair, and Board Members *W. Gibson* and *J. Redshaw*.

APPEARANCES: *Craig Flood* and *Ed Ferreira* for the applicant; *Joseph N. Tascona* and *Sam Cutruzzola* for the respondent; *Calogero Mattina* for the objectors.

DECISION OF THE BOARD; January 18, 1990

1. The name of the respondent is amended to: "Inzola Construction (1976) Limited".

2. The Board finds also that the applicant is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is The Lab-

ourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council.

3. In its decision dated March 15, 1989, the Board, *inter alia*, appointed a Board Officer to inquire into and report back to the Board on the duties and responsibilities of four persons, namely, F. Pelletier, N. Fityani, D. Rossignol and D. Quann, and, further, to conduct a check of the employment records of the respondent with respect to Pelletier, Fityani and Quann.

4. At the request of the parties, a hearing was scheduled before the Board to hear the evidence and representations regarding the Board Officer's report dated August 30, 1989 and all other outstanding issues with respect to the application for certification.

5. During the examinations before the Board Officer, the respondent indicated that, for the purposes of this application for certification, Rossignol was not to be included in the bargaining unit. That is, the respondent accepted the challenge of the applicant to the inclusion of Rossignol in the bargaining unit. Further, at the commencement of the hearing, counsel for the applicant informed the Board that the applicant was withdrawing its challenge to Quann and, consequently, that person should be included in the list of bargaining unit employees. With respect to Pelletier, the Board directed that counsel for the respondent make his submissions in support of the respondent's position that Pelletier was not managerial within the meaning of section 1(3)(b) of the Act and ruled as follows:

The Board has carefully considered the submissions of counsel for the respondent and has determined that it need not call on the applicant. Notwithstanding the thorough representations of respondent's counsel, the Board considers that the examples stressed by counsel, when placed in the context of the entire testimony of Pelletier, are not sufficient to negate the thrust of that evidence, which is that Pelletier is managerial within the meaning of section 1(3)(b) of the Act. Thus, the Board finds that Pelletier is excluded from the bargaining unit as managerial.

Counsel for the applicant then informed the Board that the applicant was withdrawing its challenge to Fityani and, accordingly, as asserted by the respondent, Fityani should be included in the list of employees in the bargaining unit.

6. As the challenges to the list were now resolved, the Board reviewed the list of employees in the bargaining unit and the membership evidence filed by the applicant in support of its application for certification.

7. The respondent filed a reply, a list of employees containing seven names on Schedule "A" and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure. The Board determined, following the disposition of the challenges to the list, that five persons should be included on the list of employees for purposes of the count.

8. In this application for certification, the applicant filed three combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date of the application. The money was collected by more than one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

9. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of one or other of the constituent trade unions of the applicant and there-

fore, pursuant to section 10(3) of the *Labour Relations Act*, are deemed to be members of the applicant on January 31, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. A statement of desire in opposition to the application was filed, signed by one person who had previously signed a membership card in support of the applicant. The statement of desire was relevant as the extent of the overlap between the statement of desire and the membership evidence was such as would generally persuade the Board to direct a representation vote, notwithstanding the level of membership support enjoyed by the applicant, if the statement of desire was proved voluntary.

11. Accordingly, the Board heard the evidence and representations of the parties with respect to the statement of desire and ruled as follows:

The Board has considered the submissions of the parties in the context of the evidence before the Board and is prepared to give its decision orally.

The caselaw established by the Board with respect to petitions is not in dispute in this instance. The jurisprudence clearly places the onus on the petitioner to convince the Board, through oral testimony, of the voluntary nature of the petition. The Board must be satisfied that the change of heart of an employee who previously signed a membership card in support of the applicant was not influenced by management nor, where there are a number of petitioners, that their signatures were not the result of perceived management involvement.

Critical to the assessment of voluntariness, is the credibility of the petitioner. Obviously, where the petition involves only one individual, that issue of credibility is paramount and virtually conclusive. In deciding on the credibility of the petitioner, the only witness, the Board has looked to the usual factors including demeanour and the consistency of the evidence on cross-examination. The Board is also aware of the impact of the lapse of time on the memories of persons who are honestly trying to recollect events which occurred some time ago.

In this instance, the Board is satisfied that the petitioner was honestly recounting the events surrounding the petition. Notwithstanding the thorough submissions of counsel for the applicant, the Board considers that the petitioner would not have inferred from the question "did you discuss the petition with any one" as including his immediate family. Further, the omission of the address on the first document sent to the Board (the petition itself) is more consistent with a document prepared at home by a family member without professional involvement than with a petition inspired or dictated by management. The Board considers that the petitioner's story, while not a "seamless piece", does hang together and ring true. Further, there is a total lack of any direct evidence to suggest management involvement. There is a fine line to be drawn at times between what may reasonably be inferred from the evidence and what is speculative. In this instance, the Board is unanimously of the view that the evidence leads to the conclusion that the petition is voluntary and the Board so finds.

Accordingly, the Board directs that a representation vote be held of the employees in the bargaining unit in accordance with the Board's usual practice.

12. Before the Board's decision directing a representation vote issued, the Board received a letter from the applicant alleging that the petitioner, in a telephone conversation with the applicant's business agent, had admitted he (the petitioner) had lied to the Board. Given the nature of the allegations, a hearing was convened to hear the evidence and representations of the parties with respect to those allegations.

13. At the hearing, the petitioner admitted to the Board that he had lied while giving testimony under oath at the earlier proceeding. Specifically, the petitioner admitted that he had lied when he stated that his daughter wrote the petition when, in fact, the petition was written by N.

Fityani. N. Fityani was one of those initially challenged as managerial by the applicant, although that challenge was later withdrawn. The Board heard testimony from E. Ferreira, the applicant's business agent, as well as the petitioner. E. Ferreira testified as to the content of the telephone conversation with the petitioner on November 22, 1989. In addition, the Board heard a tape recording of that conversation made by E. Ferreira without the knowledge of the petitioner. The conversation lasted approximately one hour. A transcript of the tape was provided to the parties and the Board for ease of reference. Notwithstanding the petitioner's acknowledgement that he had lied to the Board and had admitted his lie to E. Ferreira in that telephone conversation and the petitioner's admission that it was his voice on the tape, the petitioner persisted in his position that some portions of the tape were omitted, that the tape was "fixed", that he was under the influence of alcohol at the time and that he had been "set up" by E. Ferreira. In this latter regard, it was also conceded by the petitioner that it was he who initiated the telephone contact with E. Ferreira.

14. The Board notes that the petitioner appeared without legal counsel. The Board commented that there is no requirement that persons appearing before the Board have legal counsel and the Board not infrequently conducts hearings where one or more parties are unrepresented. However, Board hearings are legal proceedings and persons appearing on their own behalf do bear any risks involved thereby. In this instance, the Board explained the process to be followed to the petitioner both initially and throughout the proceeding. Given that the petitioner was unrepresented, the Board afforded the petitioner considerable latitude in questioning E. Ferreira and in giving his own testimony. The Board notes, however, that it was necessary on several occasions to remind the petitioner that he could not continue to repeat questions already asked and answered several times. Further, a full opportunity was given to the petitioner, as well as the other parties, to make submissions.

15. Following the evidence and representations, the Board gave the following oral ruling:

The Board has considered the evidence and submissions of the parties and regards this as an appropriate case in which to exercise its discretion pursuant to section 106 of the *Labour Relations Act* to reconsider its decision, given orally, finding the petition voluntary.

The Board need not set out at length the jurisprudence dealing with reconsideration requests. In the Board's view, the evidence of the telephone conversation between the petitioner and the E. Ferreira satisfies the criteria of "new evidence" and "due diligence". That is, the applicant could not reasonably have obtained the evidence earlier, exercised due diligence once the evidence came to light and the evidence is practically conclusive of the issue itself.

The petitioner has admitted he lied to the Board when he testified under oath that his daughter wrote the petition. In fact, as the petitioner stated today and in the telephone conversation with E. Ferreira, N. Fityani wrote the petition. The Board further finds that E. Ferreira is a credible witness and his testimony is corroborated by the tape of the telephone conversation. Quite simply, the petitioner's assertions that the tape was "fixed" and that the initial portion of the conversation was omitted are entirely implausible. In the Board's view, the petitioner lied to the Board before (as he admitted) when he thought that was in his best interest and has not been truthful today in his attempt to explain E. Ferreira's account of the conversation and the tape. In the circumstances, the Board considers that the petitioner's explanation for the origination and circulation of the petition cannot be relied upon. As the Board noted in its oral ruling, the issue of credibility in a one-person petition is critical. At the time of the initial oral ruling, the evidence before the Board led to the conclusion that the petition was voluntary. Given the petitioner's admission that he lied and the Board's conclusions with respect to the petitioner's credibility in the proceedings today, the Board is faced with an absence of credible evidence from the petitioner. Accordingly, the Board considers that the petitioner has not satisfied the onus of establishing the petition is voluntary.

The Board, therefore, will give no weight to the petition and, given the level of membership

support enjoyed by the applicant, the Board certifies the applicant for the bargaining unit set out in its earlier decision.

16. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

17. Further pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman.

**2036-89-G Ontario Sheet Metal Workers' Conference, Applicant v. Lorlea Steels,
A division of Jannock Steel Fabricating Company, Respondent**

Construction Industry - Construction Industry Grievance - Collective agreement requiring payment by "cash" or "cheque" - Employer paying by direct deposit into employees accounts with financial institution - Payment by "cash" or "cheque" meaning payment of legal tender directly to worker, not through agent financial institution

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn*.

APPEARANCES: *Bernard Fishbein*, *George Ward* and *Owen Pettipas* for the applicant; *Jack Wilson* for the respondent.

DECISION OF THE BOARD; January 2, 1990 (delivered orally)

1. The respondent Jannock is admittedly bound by the provincial agreement governing employment of sheet metal workers represented by members of the applicant in the ICI sector of the construction industry. The respondent intends to implement a direct deposit system for paying those workers their wages. The applicant grieves that such a wage payment method would violate Article 27.2 of the collective agreement, and asks for a declaration to that effect.

2. Article 27.2 of the collective agreement provides as follows:

Method of Payment

Wages at the established rates shall be paid by cash before quitting time on Friday, or if by cheque, before quitting time on Thursday each week. If Friday is a holiday, payment in cash will be on Thursday and if by cheque, on Wednesday; the employer will arrange facilities for the cashing of cheques with an area bank.

The applicant union says that direct deposit of wages in a worker's account with a financial institution is not payment "by cash" or "by cheque" as required by this Article. As for its not being payment "by cheque", it relies on the decision in *Maritime Telegraph & Telephone Co., Ltd.*, (1986) 24 L.A.C. (3d) 381 (J. A. Macchellan). It argues that payment "by cash" means delivery of "coin of the realm" into the hand of the worker. The respondent says that direct deposit amounts to payment "by cash" since the bank deposit is as liquid and accessible as cash.

3. The issue here is not whether payment by direct deposit is as advantageous or convenient for workers as payment "by cash" or "by cheque". The issue is whether payment by direct deposit is payment "by cash" or "by cheque". In our view, "payment" in Article 27.2 means payment directly to the worker, not to one of a limited number of agents from whom the employer obliges the employee to make a selection. Payment "by cash" means payment of legal tender directly to the worker.

4. We declare that payment of wages by direct deposit would not comply with the requirements of Article 27.2 of the current collective agreement.

1473-89-FC Local 2693, IWA-Canada, Applicant v. MacMillan Bloedel Building Materials Limited, Respondent

First Contract Arbitration - Employer insisting on two-tiered benefits package - Future hires in bargaining unit to receive less than longstanding benefits package enjoyed by unorganized employees - Employer position designed to send message organizing would result in loss of benefits - Position designed to penalize new hires only because union represents them - Position analogous to threatening employees with lay-off of plant shutdown for exercising rights under Act - Position uncompromising and without reasonable justification - First contract arbitration ordered

BEFORE: Robert Herman, Vice-Chair, and Board Members C. McDonald and R. W. Pirrie.

APPEARANCES: W. Dubinsky and W. McIntyre for the applicant; G. L. Firman and R. A. Dines for the respondent.

DECISION OF R. HERMAN, VICE-CHAIR, AND BOARD MEMBER C. McDONALD: January 9, 1990

1. This is an application under section 40a of the *Labour Relations Act* for a direction to settle a first contract by arbitration.
2. Section 40a(2) of the Act reads as follows:

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

3. The applicant relies solely upon the provisions of subsection (2)(b), asserting that the uncompromising nature of the bargaining position adopted by the respondent, without reasonable justification, has caused the process of collective bargaining to be unsuccessful.

4. It asserts that the respondent's refusal to agree to the same benefits received by employees prior to the certification of the applicant, and the respondent's refusal to put anything in a collective agreement which provides benefits higher than provided in comparable collective agreements, constitute uncompromising bargaining positions without reasonable justification.

5. The applicant called as its sole witness Wilf McIntyre, one of its negotiators and the first Vice-President of the applicant Local. The respondent called as its sole witness Al Dines, the Manager of Employee Relations for the Marketing Group of the respondent, and as such the individual who was responsible for all labour relations matters with respect to employees in the Marketing Group, including the employees in the instant bargaining unit. Mr. Dines flew in from Vancouver to personally conduct negotiations for the employer.

6. The bargaining unit in question consists of approximately three employees who staff and operate a Distribution Centre, distributing a variety of lumber products on a wholesale basis to retail lumber yards in northern Ontario. Many of the retail lumber yard customers of the employer have their own bargaining relationship with the applicant Local.

7. For many years the applicant had tried unsuccessfully to organize the operations of the respondent in northern Ontario. One reason for this difficulty was the high level of benefits enjoyed by the employees of MacMillan Bloedel. Since 1974, the salary and benefits of Distribution Centre employees had been comparable to the benefits received by the employees of a waferboard plant operated by the respondent in the same location. These benefits were considerably greater and more varied than benefits received by unionized employees in that area of the province and were set out in what the parties colloquially referred to as the "Red Book", a booklet provided to all employees setting out the full range of benefit plans and services provided. In April, 1988, the Distribution Centre physically moved away from the waferboard plant location, but the respondent continued to pay its employees benefits and salaried wages linked to the benefits of the waferboard plant employees. In November 1988, the waferboard plant permanently closed. The applicant was then able to successfully organize the employees of the respondent, in the Distribution Centre, and it was granted a certificate with respect to them in January, 1989.

8. Negotiations for a first collective agreement commenced and the parties were able to reach agreement on a number of non-monetary, non-benefit issues. It became apparent however that with respect to benefits the parties were significantly apart. The company initially took the

position that it would not provide benefits at the level previously provided, as described in the Red Book, but rather would only provide the level of benefits found in collective agreements in the comparable employment community, which benefits were of a significantly lower level. The company's position was also that it would never sign or put into a collective agreement any benefits that were greater than community standards, for to do so would enable the union to "wave the collective agreement in its face". The union's initial position was that the employees should receive the same level of benefits they had received prior to the certification of the union.

9. Neither party moved from these positions through the first three negotiating sessions. Conciliation was applied for after the conclusion of the third negotiating session on May 8, 1989, when the union told the employer it would be applying for conciliation forthwith. The company at that time felt conciliation was premature, as it felt the parties had been making steady progress on matters other than benefits. When Mr. Dines protested that conciliation was premature, Fred Miron, the President of the applicant union, advised him that the union "didn't have time to spend on such a small collective agreement, and if the company was unwilling to meet the union's demands, then it could forget it."

10. Conciliation began at the fourth bargaining session, on June 22nd, 1989 and, for reasons we will come to later, the company offered to grandfather or red circle current employees and new employees hired by January 1, 1990, so that these employees would continue to receive the Red Book benefits and also any increase in wages or benefits subsequently negotiated. The company thus proposed a two-tiered system of benefits, with only employees hired after January 1 receiving less than the currently received Red Book benefits. The union continued to insist on the maintenance of current benefit levels (the Red Book) but offered to freeze those benefits until the rest of the community caught up.

11. With the assistance of the conciliation officer on June 22nd, the parties were able to negotiate an agreement with respect to some benefits, including provisions concerning jury duty, bereavement leave, and statutory holidays. But none of these three were benefits covered by the Red Book, and the successful negotiation of these items does not suggest that the parties were able to negotiate benefits of the kind encompassed by the Red Book. There was one other benefit item which the parties were able to negotiate on June 22nd, and it was a benefit covered by the Red Book, a medical, surgical, hospital, and drug care plan (Article 18:01 as agreed to by the parties). The evidence on this point however, indicates that the employer's proposal was agreed to by the union because it provided benefits comparable to those contained in the Red Book. This agreement reflects only the employer's willingness on this single benefit to negotiate a clause which continued the current benefit. On all the other categories of benefits encompassed by the Red Book, the employer remained unwilling to negotiate any benefit at a level previously and currently provided, and the union continued to insist on maintaining the existing benefits and in opposing any two-tiered benefits. The union did not propose specific language for any of these benefits, as it felt the parties remained apart on the essential principle, whether current levels of benefits must be maintained. The benefits over which the parties thus remained apart in principle included vacations with pay, weekly indemnity, group life and accidental death and dismemberment, dental plan, pension plan, homeowners, automobile and marine insurance, travel accident insurance, the retirement plan, share purchase plan, and registered retirement savings plans.

12. Mr. Dines testified as to the company's four justifications for its bargaining position. First, the company was concerned with respect to its other collective agreements with the applicant union. The company was aware of the applicant's bargaining strategy of pattern bargaining, by establishing a particular collective agreement with high benefits and then "forcing it down the [throat of the] other partner." The company felt very strongly that it would be faced with the Red

Book benefit levels in future negotiations in other bargaining units that had to date been receiving lower standards of benefits.

13. Second, the company was concerned about the potential possibility of the applicant union organizing its other non-union branches, by presenting a published collective agreement with the high level of benefits contained in the Red Book.

14. Third, the company was concerned about its own customers, the retail lumber yards, who had their own collective agreements with the applicant union. The company feared that its retail customers would be faced in their own forthcoming negotiations with a published collective agreement with the respondent which contained high levels of benefits. This might place its customers under severe pressure to increase the benefits in their own collective agreements. In turn, the company might lose these customers because they would feel the respondent had set too high a standard.

15. Fourth, the company was motivated by concern over the views of those companies within its peer group who were competitors, for example, Abitibi and Domtar. In this respect, Mr. Dines testified that MacMillan Bloedel was concerned that the applicant union would present high demands when negotiating with its competitors, demands based upon MacMillan Bloedel's collective agreement and the high levels contained therein, and the respondent would be seen to have set new levels of benefits for all of Northern Ontario.

16. Mr. Dines further testified as to why on June 22nd the company came to modify its initial proposal. Specifically, it made the offer to grandfather employees hired by January 1, 1990 because "when the company examined its position, and after talking with people in the Ontario scene, there was a feeling because of some of the first contract arbitration cases, that there should not be a penalty for employees to join the union". Accordingly, he testified, the company modified its position in order to protect those employees who were currently at the Distribution Centre, so that they should not suffer. At the same time, the company could continue to negotiate a collective agreement with community standards, but only for those hired after January 1, 1990. In this way, Dines testified, the company would be able to avoid penalizing current employees, yet also avoid providing a collective agreement with benefits higher than community standards.

17. The June 22nd session ended with the parties still apart on the principle of whether the current levels of benefits were to be maintained for the entire bargaining unit. The fifth and final bargaining session took place on July 20th, 1989. There was no movement with respect to the fundamental dispute over the principle of the appropriate benefits. The instant application was not filed by the union until September 14, 1989, approximately two months later. There is no evidence that any interaction between the parties took place during this two month interval. The parties also agreed, in writing, to extend the time for the hearing of this application, and it was accordingly heard on November 20 and 21, 1989.

18. There is no question that the positions of both parties were uncompromising with respect to the appropriate benefits (although both parties advised the Board that all other matters were resolvable if the benefits hurdle were crossed). Neither party budged on this core dispute, an issue both parties considered and treated as an issue of principle. The employer was not prepared to offer the current level or variety of Red Book benefits to new employees, and the union insisted on maintaining the current benefits for all employees.

19. The Board is satisfied that the process of collective bargaining has been unsuccessful. Although there is no specific number of sessions or steps that parties must go through in order for the Board to conclude that the process has been unsuccessful, we are satisfied in the circumstances,

given the positions of the parties and the lack of any meaningful progress whatsoever with respect to the resolution of their difference in principle with respect to the appropriate level of benefits, that the process of collective bargaining has been unsuccessful. It is clear that neither party will move from its position on this central dispute, and that this disagreement effectively prevents the process of bargaining from moving forward. There is simply no reasonable likelihood that the employer (who treats this issue so seriously that it has flown its international manager in from Vancouver to personally handle the negotiations for this 3 person bargaining unit) will compromise on its position to not offer to continue current benefits for new employees. Nor will the union agree to benefits less than enjoyed before unionization, nor to a two-tiered system. Both parties remain uncompromising in their positions and bargaining is effectively at impasse.

20. As the provisions of section 40a(2) illustrate, the process of collective bargaining must have been unsuccessful *because* of one of the enumerated reasons. In the instant case, the applicant asserts the cause of the impasse as the uncompromising nature of the bargaining position adopted by the respondent without reasonable justification. We adopt the view taken by the Board in *Formula Plastics* [1987] OLRB Rep. May 702, as to the approach the Board ought to take in assessing the reasonableness of the respondent's justifications. Can we say that the justifications provided by the employer for its bargaining position with respect to benefits are reasonable? And if not, did this cause bargaining to be unsuccessful?

21. The financial burden to the company of continuing to pay current benefits to Distribution Centre employees was not the justification for its position. And the company was not being asked to justify why it was refusing to agree to a proposal to provide *increases* in benefits after employees were organized. That scenario is not before us. Rather, the company took the position that it would not continue to pay the *existing* level of benefits that employees had been receiving for the fifteen years before they were organized.

22. As Mr. Dines testified, the company took this position for several reasons. The company felt that if it gave organized workers the benefit levels that unorganized employees had received, then it would be pressured to provide similar higher levels in its other collective agreements with the applicant, the applicant would be able to organize elsewhere in the company, the customers who bargained with the applicant would leave the company, and competitors of the company would have to pay similar benefits to their unionized workers. The objection was not *per se* to paying such high levels of benefits, for the company had always paid this level to its (unorganized) employees. Nor (for example) had the company previously been concerned that the high levels of benefits it paid might put pressure on its competitors to pay similar high levels. It was only concerned that it not pay its *unionized* employees these high benefits. The objection was to continuing to pay such levels to employees *because* they were now organized. These justifications, looked at in context, are designed to send a message that unionizing will cost employees the benefits they had received prior to becoming organized. Although current employees and those hired before January 1, 1990 would continue to receive the current benefits, a two-tiered system as proposed by the employer would clearly foment dissension within the bargaining unit and with the bargaining agent. It is a proposal which will likely lead to a decertification application, for under it new employees will receive less benefits *only because* the union represents them. Two-tiered systems are not inherently unreasonable, and many negotiations consider such proposals. What makes the instant proposal unreasonable is the context in which it is proffered and the justifications or reasons behind it. The employer's bargaining position is also designed to discourage other employees who might want representation, and unions who might seek to organize them. It tells them that the response to unionization is a reduction in benefits. It is qualitatively no different a message than threatening to lay off employees or close the business only because employees have organized or are contemplating so doing. This bargaining position is not reasonably justified for purposes of sec-

tion 40a(2)(b) of the Act. It is not reasonable to take a position of reducing current benefits when one of the main reasons for doing so is only because a union now represents employees.

23. We are therefore satisfied that the process of collective bargaining has been unsuccessful and that the uncompromising nature of the bargaining position adopted by the respondent was without reasonable justification. We have also carefully considered whether the necessary causal connection is to be found between the bargaining position of the respondent and the impasse that collective bargaining has reached. We have some concerns about the union's conduct and we have assessed whether the union was only "going through the motions" of negotiating, and was really attempting to use a first contract application to supplant the negotiating process and to avoid the expense of protracted negotiations for a three person bargaining unit. However as noted, in our view there is no reasonable possibility either party will abandon the principle behind their respective bargaining positions, and we remain satisfied that bargaining has been and will continue to be unsuccessful because of the nature of the company's proposal and the company's justifications for it.

24. For the above reasons, we therefore direct the settlement of the parties' first collective agreement by arbitration.

DECISION OF BOARD MEMBER ROSS W. PIRRIE; January 9, 1990

1. I dissent from the majority's decision as set out above.

2. Section 40a(2)(b) of the Act, on which the applicant relies, speaks to "the uncompromising nature of any bargaining position adopted by the respondent...". It should be noted that, with the exception of Article XI - NO STRIKE - NO LOCK-OUT, all of the provisions thus far agreed to by the parties in bargaining this first collective agreement represent compromises by the employer. True, on the benefit or "red book" provisions the company has to date refused to agree to the unions uncompromising demand that the essence of the "red book" provisions be incorporated in the collective agreement. In this regard it is, in my view, significant that the employer did in fact agree to grandfather the existing employees, ie. they compromised their original position of only being prepared to agree to a community level of benefits for all employees. I cannot agree that the respondent has been uncompromising in its bargaining position in general, or specifically with regard to benefits. To the contrary, it is in my view that it is the union which has adopted and displayed throughout negotiations an uncompromising posture vis-a-vis the benefit issue, ie. we will agree only to the "red book" provisions and nothing else.

3. I do not agree that a case can be made for a first collective agreement direction under section 40a(2)(b).

1224-89-U; 1225-89-U; 2034-89-U Prosper Brizzard, Richard Brizzard, Robert Casson, Richard Koski, David Jaggard, Manfred Krause, Robert Krause, David Ross, Aulus Tiitto, Darrell Westover, Raynard Jacobson, Bruce Nordstrom and Larry Jaggard, Complainants v. **Wilf McIntyre**, Fred Miron, Roland Frayne, Niels Husman, Larry Duhaime and International Woodworkers of America - Canada Local 2693, Respondents; Gravel and Lake Services Limited, Applicant v. Roland Frayne, Niels Husman and Larry Duhaime, Respondents; Gravel and Lake Services Limited, Applicant v. International Woodworkers of America - Canada Local 2693, Respondent; Gravel and Lake Services Limited, Applicant v. International Woodworkers of America - Canada Local 2693, et al., Respondents

Employee Reference - Practice and Procedure - Respondent complaining to Board about Labour Relations Officer designated to inquire into employee duties and responsibilities - Practice Note 4 establishing procedure for objections - Matters not specifically covered by Practice Note to be handled by analogy - Officer having discretion over proceedings within parameters of Practice Note and Board direction - Board ruling on complaint appropriate only after receipt of Officer's report and parties' submissions

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *R. M. Sloan* and *D. Patterson*.

DECISION OF THE BOARD; January 12, 1990

1. By letter dated January 9, 1990, the International Woodworkers of America - Canada Local 2693 ("Local 2693") complains about the conduct of the Labour Relations Officer designated to conduct the inquiry authorized by the Board in this proceeding and request that the Board makes certain directions with respect thereto.

2. We observe that the author of the letter, Wilfred McIntyre, was not present at the hearing on December 5, 1989 at which the inquiry was proposed and discussed with the parties. It is not clear whether anyone who was present at that hearing on behalf of any of the respondents was also present during the proceedings before the Officer. We also observe that the nature and circumstances surrounding this proceeding in general and the Officer's inquiry in particular are somewhat unusual. The procedure adopted by an Officer must always be viewed in context.

3. In our view, there is insufficient information before the Board with respect to Local 2693's specific objections to enable the Board to rule on or address them at this time. Further, it would, in any event, be inappropriate to do so at this time. Board Practice Note No. 4, which the Board's decision dated December 11, 1989 specifies is generally applicable to the inquiry being conducted, establishes the general procedure for such inquiries, including the manner in which objections should be made. In our view, matters not specifically dealt with in Practice Note No. 4 should be dealt with by analogy to it. Further, an Officer has a discretion with respect to how s/he proceeds with an inquiry within the parameters established by Practice Note No. 4 and any directions from the Board. For the Board to intervene in the midst of an inquiry being conducted by an Officer would, particularly in this case, be inconsistent with Practice Note No. 4 and tend to delay the inquiry. The appropriate time for the Board to rule on such matters is after it has received the Officer's report and the parties submissions with respect thereto. (See, *Hollingworth Drain Services*, [1987] OLRB Rep. Oct. 1250; *Strongland Construction Ltd.*, [1987] OLRB Rep. Oct. 1330; *Ottawa Structural Concrete Services Ltd.*, Board File No. 0666-87-R, September 4, 1987, unreported).

4. Accordingly, Local 2693's requests are denied but without prejudice to its right to address its objections to the Board at the proper time.

5. Given the somewhat unique circumstances in this proceeding, however, the Board wishes to note that, as was communicated to those present at the hearing on December 5, 1989, it intended that the 13 persons whose names appear at the bottom of the first page of the Officer's report with respect to the meeting held on November 30, 1989 (and which is Exhibit 22 in the proceedings before the Board) would be examined in accordance with the procedure set out in paragraphs 3 and 5 of Practice Note No. 4 and that any other persons which any party asserts should be on the list of employees for the purpose of this proceeding would have to be named by the party making the assertion and that that party would bear the onus of adducing evidence with respect thereto (i.e., in accordance with or by analogy to paragraph 9 of Practice Note No. 4). It was *not* intended that any party of the *Officer's inquiry* would deal with a review of the Officer's earlier report (that is, Exhibit 22) or the procedures he adopted with respect to it.

6. The Officer is directed to continue with his inquiry.

1514-89-R Robert A. Wallace, Applicant v. United Food & Commercial Workers International Union, Local 175, Respondent v. Town of Palmerston, Intervener.

Termination - Timeliness - Collective agreement with retroactive duration clause executed after otherwise timely termination application cannot bar application

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *J. A. Ronson* and *K. Davies*.

APPEARANCES: *Robert A. Wallace* on his own behalf; *Lionel G. Clarke* for the respondent; *P. M. Rusak* and *Larry Adams* for the intervener.

DECISION OF THE BOARD; January 26, 1990

1. In a decision dated January 9, 1990 the Board found the present application for a declaration that the respondent no longer represents the employees in the bargaining unit to be timely. The Board further directed that a representation vote be held. What follows are the reasons for the Board's ruling with respect to the issue of the timeliness of the application.

2. The respondent was certified to represent the employees of the intervener on March 25, 1988. Negotiations followed, a conciliation officer was appointed on December 13, 1988 and on February 20, 1989, a day on which the parties met with the assistance of the officer, a Memorandum of Agreement was executed. Although the Memorandum was not filed in evidence in these proceedings, the parties agreed that the document contemplated ratification by employees. Shortly thereafter, however, employees voted to reject the terms of the Memorandum.

3. On March 14, 1989 the applicant filed a termination application which a differently constituted panel of this Board dismissed as being untimely, having been filed within one year of the date of certification (Board File No. 3073-88-R)

4. On April 24, 1989 a "no board" report was issued. The present application was filed on

September 20, 1989. Sometime after the present application was filed the union prepared and forwarded to the employer a draft collective agreement executed by the union on September 27, 1989. The employer sought some clarification and legal advice but ultimately, on November 10, 1989, it too executed the document.

5. The stated duration of the collective agreement is from December 1, 1988 to December 31, 1989 and thus, the respondent argues, includes the date of the present application.

6. The union concedes that "in fact" there was no collective agreement in operation on the date this application was filed. Indeed, the union never asserted that any collective agreement was consummated prior to November 10, 1989, the date of execution by the employer. The union argues, however, that by virtue of its retrospective effect the collective agreement is a bar to the present application. The union, in other words, asserts that a collective agreement executed subsequent to an otherwise timely termination application can, by virtue of its duration clause, retroactively constitute a bar to such application.

7. The union relies on *Mortluck Construction (1963) Limited*, [1973] OLRB Rep. Apr. 204 and *Cadillac Fairview Corporation Limited*, [1978] OLRB Rep. Nov. 973 in support of its position.

8. In both of the cases relied upon by the union it was necessary to determine when the collective agreements in question commenced and ceased operation in order to subsequently determine whether the respective applications were timely under section 57(2) or section 5(4) as the case may be.

9. In *Mortluck Construction, supra*, the incumbent union claimed the certification application was untimely by virtue of a collective agreement between the incumbent and the employer. Having regard to the duration clause of the agreement the application appeared timely. The incumbent union argued, however, that since the agreement did not specify wage rates until August 21, 1972, some four months after its stated commencement date, the agreement should be viewed as having commenced operation on August 21, 1972. The agreement would then expire one year later altering the open period accordingly and rendering the application untimely. The Board rejected this argument and concluded that the agreement envisaged on operative effect prior to its date of execution, that the term of the agreement was as stated therein and that the application was consequently timely.

10. In *Cadillac Fairview, supra*, the Board, in order to determine the open period and, consequently, the timeliness of the termination application, again had to determine whether the collective agreement commenced operation on the date it was executed or on the (earlier) stated commencement date of the agreement. In this case the Board ruled the agreement commenced operation on the execution date rendering the application untimely in that case.

11. There are indeed a series of cases where the Board has had to determine the precise duration of a collective agreement. Where, for example, a one year agreement is executed and made retroactive to a date prior to its execution, the operation of section 52(1) of the Act, which may deem the agreement to operate for a term of one year from the execution date, can result in an open period different from the one which would result if one considered only the stated one year term of the agreement.

12. In these situations the Board has viewed the execution date (rather than the stated earlier commencement date) as the date upon which the agreement commences operation for the purpose of the timeliness of a termination or displacement application (see for example *Intercontinental Warehouses Limited*, [1959] OLRB Rep. Mar. 34; *Seven-Up (Ontario) Limited*,

[1972] OLRB Rep. Nov. 965; *Cadillac Fairview*, *supra*; *Boucher's Amherstview Supermarket*, [1986] OLRB Rep. Nov. 1497). There are, however, situations where the facts have dictated a contrary result (see for example *Mortluck Construction*, *supra*; *Dad's Cookies Ltd.*, [1978] OLRB Rep. Jan. 116).

13. These cases, however, do not assist the union in the present matter. All of the above cases involve situations where there is no dispute that a valid collective agreement is in force at the time the application is made. The disputes center rather on determining the open period under the relevant agreement.

14. In *Lesmith Limited*, [1981] OLRB Rep. Feb. 190, the union argued that a termination application was untimely by virtue of a collective agreement executed shortly after the termination application was filed. It is not clear from the report whether the collective agreement purported to have retroactive effect. Despite this possible distinction we find the Board's comment (at p. 191) instructive:

The fact that a collective agreement was made subsequent to the filing of this application ... is not a relevant consideration ... The present application ... is made under section 49(1) [now 57(1)] and the employees are entitled to look at the situation at the time when the application is made. Indeed the main thrust of section 53 [now 61] is to protect the collective bargaining process. The protection of the bargaining process afforded by section 53 having run out, the respondent trade union cannot, subsequent to an application, defeat that application by signing a collective agreement with the employer.

The above, in our view, is a complete answer to the union's objection. The utility and value of retroactive provisions in collective agreements are well known and we do not wish to be understood as drawing any more general conclusions as to the retroactive impact of the present collective agreement. We are of the view, however, that the application was clearly timely on the date it was filed and would have been held to be timely had the hearing been held on the date of application. In those circumstances we cannot see how the subsequent signing of a collective agreement can, by reason of its stated duration including the date of this application, retroactively render this application untimely.

15. It was for these reasons that we ruled in our decision dated January 9, 1990 that this application is timely.

0068-88-R; 0767-88-R; 1149-88-R; 1484-88-R; 1552-88-R; 2261-88-R; 2666-88-R
 Canadian Guards Association, Applicant v. Pinkerton's of Canada Ltd.,
 Respondent v. Richard Bibeault, Intervener #1 v. Inco Limited, Intervener #2 v.
 Attorney-General of Ontario, Intervener #3; Canadian Guards Association,
 Applicant v. Pinkerton's of Canada Ltd., Respondent v. Inco Limited, Intervener
 #1 v. Attorney-General of Ontario, Intervener #2; Canadian Guards Associa-
 tion, Applicant v. National Protective Services Company Limited, Respondent v.
 George Faulkenburg, Intervener #1 v. Inco Limited, Intervener #2 v. Attorney-
 General of Ontario, Intervener #3; Canadian Guards Association, Applicant v.
 Board of Management for the Metropolitan Toronto Zoo, Respondent v. Interna-
 tional Union United Plant Guards Local 1962, Intervener #1 v. Ron Saxton,
 Intervener #2 v. Inco Limited, Intervener #3 v. Attorney-General of Ontario,
 Intervener #4; Canadian Guards Association, Applicant v. Burns International
 Security Services Limited, Respondent v. Gordon A. Southorn, Intervener #1 v.
 Inco Limited, Intervener #2 v. Attorney-General of Ontario, Intervener #3;
 Canadian Guards Association, Applicant v. Wackenhut of Canada Limited,
 Respondent v. Shane Freeman, Intervener #1, v. Inco Limited, Intervener #2 v.
 Attorney-General of Ontario, Intervener #3; United Steelworkers of America,
 Applicant v. Pinkerton's of Canada Ltd., Respondent v. Larry Bishop, Intervener
 #1 v. Inco Limited, Intervener #2 v. Attorney-General of Ontario, Intervener #3

Certification - Charter of Rights and Freedoms - Evidence - Natural Justice - Practice and Procedure - Witness - Employee sidesperson while former MPP had objected in Legislature to provision of Act - Constitutionality of provision challenged in current proceedings - Employer alleging reasonable apprehension of bias - Board rejecting allegation - Board members appointed because of labour relations experience - Remarks made in different context nineteen years ago - Union seeking to call expert witness on content of freedom of association in European countries - Evidence analogous to legal argument about proper scope of freedom of association - Evidence not admissible in determining content of *Charter* freedom - Evidence admissible in determining whether provision reasonable limit to *Charter* freedom

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *W. H. Wightman* and *H. Peacock*.

APPEARANCES: *Brian Shell* and *Paula Turtle* for the applicants and the intervening employees; *M. J. Gleason* for Pinkerton's of Canada Ltd.; *G. S. Monteith* and *K. Thompson* for the Board of Management for the Metropolitan Toronto Zoo; *Richard P. Stephenson* for International Union United Plant Guards Local 1962; *Michael Gordon* for Burns International Security Services Limited; *Brian P. Smeenk* for Wackenhut of Canada Limited; *Harvey A. Beresford*, *John C. Field*, *Wallace T. Gretton*, and *Guy Giorno* for Inco Limited; no one appeared for the Attorney-General of Ontario or for National Protective Services Company Limited.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER, W. H. WIGHTMAN; January 31, 1990

1. These seven applications for certification are currently being heard together for purposes of determining whether a portion of section 12 of the *Labour Relations Act* is inconsistent with the "freedom of association" guaranteed by section 2(d) of the *Canadian Charter of Rights*

and Freedoms (the “*Charter*”), and if so, whether it is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, within the meaning of section 1 of the *Charter*. This decision pertains to certain issues which have arisen in the course of the hearing:

- (1) the issue of whether Board Member Peacock’s presence on this panel gives rise to a reasonable apprehension of bias; and
- (2) issues regarding the reception of expert evidence.

I

Introduction

2. Section 12 of the Act provides:

The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers’ organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.

3. It is the position of the applicants and the intervening employees that the portion of section 12 which provides that “no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers’ organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards”, is violative of section 2(d) of the *Charter* and is not “saved” by section 1. The portion of section 12 which precludes the Board from including in a bargaining unit with other employees a person employed as a guard to protect the property of an employer is not being challenged.

4. In a decision dated June 27, 1988 in File No. 0068-88-R (*Pinkerton’s of Canada Ltd.*, [1988] OLRB Rep. June 613), the Board found the Canadian Guards Association (the “CGA”) to be “affiliated, directly or indirectly” with the United Steelworkers of America (the “USWA”) in view of their relationship under the terms of their Service Contract (quoted in paragraph 5 of that decision). Thus, the Board concluded that unless the *Charter* challenge succeeded, section 12 would preclude the Board from certifying the CGA and requiring Pinkerton’s of Canada Ltd. (“Pinkerton’s”) to bargain with the CGA on behalf of any of its guards.

5. A pre-hearing conference in respect of these applications was convened before Vice-Chair S. A. Tacon on February 10, 1989, and continued on March 10, May 19, and July 7, 1989. On March 10 and July 7, representatives of the parties also appeared before this panel of the Board to make submissions on procedural issues which they had been unable to resolve. Our rulings concerning those issues are set forth in *Pinkerton’s of Canada Ltd.*, [1989] OLRB Rep. July 783. (An application for judicial review of that decision was dismissed on August 23, 1989: see [1989] OLRB Rep. Aug. 924.)

II

The Bias Issue

6. The hearing of the merits of the aforementioned *Charter* challenge was scheduled to commence on September 5, 1989. However, at the commencement of the hearing on that day,

counsel for the respondent Burns International Security Services Limited ("Burns") advised the Board that he had been instructed by his client to object to Board Member Peacock sitting on the panel of the Board assigned to hear this case, on the grounds that his presence on the panel gave rise to a reasonable apprehension of bias. In support of that objection, counsel referred the Board to a brief passage from a speech which Mr. Peacock made in the Ontario Legislature on November 13, 1970. The capacity in which Mr. Peacock was speaking at that time is recorded as follows at page 6470 of the pertinent Report of the Ontario Legislature:

Mr. H. Peacock (Windsor West): Mr. Speaker, on third reading of Bill 167, An Act to amend The Labour Relations Act, I rise on behalf of the New Democratic Party group in this Legislature to finally put on the record our unalterable opposition to the passage of this particular piece of legislation....

The passage on which Burns relies appears at pages 6472-6473 and pertains to what is now section 12 of the Act:

[Bill 167] completely disenfranchizes a particular group of employees - those who work as plant guards or security guards - from real genuine participation in the trade union movement of this province. True, the bill will allow them to form a union, but only a union which represents no other persons but security guards or plant guards. The bill denies them affiliation with a local labour council, a central labour body like the Federation of Labour for Ontario or the Canadian Labour Congress.

I suggest to the minister, as has already been done before, that these employees - already so badly underpaid, subject to long and capricious hours of work and exceptional discipline because of the high rate of turnover in that particular occupation - are going to remain at the bottom of the collective bargaining ladder because they will not be able to make use of the supportive services and facilities of such central labour bodies as the federation in setting their collective bargaining goals and achieving them against their managements and employers.

7. Counsel for Burns referred the Board to the following authorities in support of his client's position: *Szilard v. Szasz*, [1955] S.C.R. 3; *Re Refrigeration Workers Union, Local 516 and Labour Relations Board of British Columbia* (1986), 27 D.L.R. (4th) 676 (B.C.C.A.); *R. v. Ontario Labour Relations Board; Ex parte Hall*, [1963] 2 O.R. 239 (O.H.C.); and *Committee for Justice v. National Energy Board*, [1978] 1 S.C.R. 369.

8. Burns' position was supported by counsel for Pinkerton's, who referred the Board to pages 6251-6259 of the aforementioned Report of the Ontario Legislature, in which Mr. Peacock is recorded to have made the following comments concerning what is now section 12 of the Act on November 10, 1970, while Bill 167 was being debated in Committee of the Whole:

Mr. Peacock: Mr. Chairman, on section 8 I would like to move that section 9 of the Act, as re-enacted by clause 8 of the bill, be amended by deleting the words "in either case" in the eighth line and by deleting the words "or is chartered by or is affiliated directly or indirectly with an organization that admits to membership" in lines 9 and 10, so that the clause will read:

The board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with the trade union on behalf of any person who is a guard if the trade union admits to membership persons other than guards.

In effect, what the amendment is to provide, Mr. Chairman, is that-

Mr. Chairman: Perhaps I should place the amendment first and then the member can discuss it.

Mr. Peacock moves that clause 8 be amended by deleting the words "in either case" in the eight [sic] line, and by deleting the words "or is chartered by or is affiliated directly or indirectly with an organization that admits to membership" in lines 9 to 11.

The member for Windsor West.

Mr. Peacock: Mr. Chairman, the section has been brought in, as I understand from the minister's explanation in the standing committee, to clarify the Knights' Guards case, and section 9 puts forward two propositions. The first, which my amendment leaves intact, is that a bargaining unit of employees who are guards, whether acting or working under contract, or whether directly employed by an employer, may belong only to a union which represents guards and no other classes of employees.

The second proposition is the one which the amendment seeks to delete. That is, that such a union that represents only security guards under contract arrangements may not be affiliated directly or indirectly with an organization that admits to membership persons other than guards. I think, as the minister affirmed to us in the standing committee, in effect what the result will be is that such a trade union will not be able to participate in the activities of a local labour council, a provincial federation of labour, or the Canadian Labour Congress.

Mr. MacDonald: That is sure to keep them weak.

Mr. Peacock: That means that the name "trade union" will be given only by this Act and by no other reason to that group of members made up of security guards because in this day and age, in the practice of modern industrial relations, it is inconceivable that the minister should want to disenfranchise this particular class of employees in the name of protecting them, as I think he put it in the standing committee, from undue influence from their fellow trade union members in other unions affiliated to a central labour body.

The security guards therefore will be without benefit of representation in legislative matters primarily when their local council at the municipal level, their provincial federation at this level of government or the Canadian Labour Congress, dealing with the national economic and legislative problems, will want to speak on such matters. Despite the minister wagging his head, that is exactly what he put to us in the standing committee, that the trade union which is organized to represent guards and guards alone will not be permitted to affiliate itself with the Ontario Federation of Labour, the Canadian Labour Congress or a local labour council. If that is not correct, Mr. Chairman, perhaps the minister would care to explain.

Hon. Mr. Bales: The portion I was disagreeing on with the hon. member was that they could not make representation. Not that we should necessarily copy it, but this is the same principle as pertains in the United States in reference to plant guards there. They can belong to the international union of plant guards, which is an international union that has various affiliates and so on. They can make representations as to legislation - and they should - but they do not need to belong to any other affiliate group to be able to do that.

These people have a distinct responsibility. It is their job to guard the employer's property and to adequately deal with their particular type of occupation in their responsibilities. They have to be free of any conflict of interest. I think it is as simple as that. It is not any attempt to prevent them; it just widens the area by which they can obtain a union. What in fact the hon. member is saying is that they should be able to affiliate themselves with some other group, any other group, whether there is any conflict of interest or not.

Mr. Peacock: That is exactly what I am saying. I am saying they should be able to affiliate to a central labour organization.

Once again, I think the words that have been applied earlier to the minister's explanations, or attempted explanations, are in this case just nonsense. It is just nonsense to speak of such a union being able to affiliate on an international basis to a branch or a parent organization in the United States. With all his talk about autonomy and so on, that argument is just nonsense.

The fact is that one essential thing he is denying to such a union, which will have to exist on its

own without benefit of support by any other class of employees except guards, is the research facilities of a central labour organization.

The second thing he is denying them is representation on such matters as workmen's compensation and unemployment insurance, because it is just not possible, I suggest to the minister, for a union based on such a narrow membership structure as security guards, who are notoriously underpaid, to provide for themselves all the various kinds of services that central labour bodies now provide for their smaller affiliates. There is no way that a plant guard union as such in this Province of Ontario is going to be able to buy all of those services that today have to go with proper trade union representation for a group of employees.

How would one group of plant guards in the city of Windsor know what conditions prevail in another bargaining unit elsewhere if they do not have access to the co-ordinating services of a central labour organization? They will simply be in an extremely difficult position to begin to perform their prime function of collective bargaining if they do not have that affiliation to a central labour organization.

The whole purpose of affiliation is for the exchange of information; that is what it is about. It is not to exert undue influence, to use the minister's words, on a particular group of employees.

And his proposition that plant guards somehow have a particular responsibility to their employer, above and beyond what other employees have to their employers in a normal industrial establishment, just does not wash. It certainly is not a responsibility that extends beyond the employer-employee relationship to this Act, but that is what the minister is saying. He is saying that the responsibilities of a security guard, in carrying out his assignments as an employee, are much greater and because they are much greater they are therefore going to be nailed down by the wording of this clause.

I say to the minister that the responsibility of such an employee as a security guard is no more and no less than it is in any other class of employees. If he does not fulfil his assignment to the satisfaction of his employer, his employer then has reasonable cause to dismiss him or take other disciplinary measures. There should be no other way of treating a security guard distinctly from the kind of employer-employee relationship that exists between any other group of employees.

I say to the minister once again he is simply putting these people in a second-class position. They are already among the lowest-paid group of employees - my colleague says they work the longest hours - in every respect they are at the bottom of the collective bargaining totem pole: First of all, with employers who are extremely resistant to organization; secondly, who are extremely resistant to paying the comparable rates of pay and matching working conditions for those bargaining units to which the guards will be attached through contract. Quite obviously this will weaken the efforts of the security guards tremendously to try to obtain the same wages and working conditions as enjoyed by those working in the plants and establishments that they are supposed to be protecting.

• • • •

Mr. Peacock: Mr. Chairman, may I ask the minister, what is his conception of the discipline that the Ontario Federation of Labour or local labour council may exercise over a constituent affiliated trade union?

Mr. Pilkey: Right. Good question.

Hon. Mr. Bales: It varies in the different situations.

Mr. Deans: Tell us.

Mr. Peacock: Has the minister examined the constitution of the Ontario Federation of Labour or the bylaws of the local labour council?

Mr. MacDonald: They have no exercise of discipline.

Mr. Makarchuk: Name one.

Mr. Peacock: Which part of the constitution of the Ontario Federation of Labour or which set of local labour council bylaws has he read which empowers that group to impose some discipline over an affiliated organization which is parallel to, or greater than, the discipline which the parent body of the local union may exercise?

To my knowledge, there is none exercisable by a local labour council or the Ontario Federation of Labour over one of its affiliates. Because, in the first place, Mr. Chairman, neither of them - and this includes the CLC - may say to an affiliated union, "You must do such-and-such in expressing your collective bargaining demands or in taking strike action, or taking a secret ballot vote, or in fulfilling any provisions of The Labour Relations Act."

There is not a single particle of evidence in any of the constitutions or bylaws of those bodies which would support the minister's contention that they can exercise some kind of discipline over a unit of security guards. None to my knowledge. And if he knows of it and if that is the grounds for his moving this amendment, I hope he will inform the House of it.

• • • •

Mr. Chairman: Right. All those in favour of Mr. Peacock's motion will please say "aye."

Those opposed please say "nay".

In my opinion, the "nays" have it.

• • • •

9. Counsel for the applicants and the intervening employees submitted that the comments which Mr. Peacock made in the Legislature in 1970 did not give rise to a reasonable apprehension of bias. He also contended that there had been an "unseemly delay" in raising the matter.

10. After recessing to consider the matter, the Board rendered the following oral ruling:

Having duly considered the submissions of the parties, the Board is unanimously of the view that Mr. Peacock's presence on this panel does not give rise to a reasonable apprehension or likelihood of bias. Accordingly, this panel will continue as presently constituted. Our reasons for this decision will issue at a later date.

11. As indicated in that ruling and in the authorities to which we were referred by counsel for Burns, the issue is whether Board Member Peacock's presence on this panel gives rise to a reasonable apprehension (or likelihood) of bias. We unanimously concluded that it does not for the following reasons.

12. Section 102 of the Act provides, in part, as follows:

(2) The Board shall be composed of a chairman, one or more vice-chairmen and as many members equal in number representative of employers and employees respectively as the Lieutenant Governor in Council considers proper, all of whom shall be appointed by the Lieutenant Governor in Council.

• • • •

(4) The chairman or, in the case of his absence from the office of the Board or his inability to act, the alternate chairman shall from time to time assign the members of the Board to its various divisions and may change any such assignment at any time.

• • • •

(8) Each member of the Board shall, before entering upon his duties, take and subscribe before the Clerk of the Executive Council and file in his office an oath of office in the following form:

I do solemnly swear (or solemnly affirm) that I will faithfully, truly and impartially, to the best of my judgment, skill and ability, execute and perform the office of chairman, (or vice-chairman, or member) of the Ontario Labour Relations Board and I will not, except in the discharge of my duties, disclose to any person any of the evidence or any other matter brought before the Board. So help me God. (omit this phrase in an affirmation).

(9) The chairman or a vice-chairman, one member representative of employers and one member representative of employees constitute a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Board.

(10) The Board may sit in two or more divisions simultaneously so long as a quorum of the Board is present in each division.

• • • •

Thus, the tripartite composition of the Board includes members representative of employers and members representative of employees. In *Re Marques and Dylex Ltd.* (1977), 18 O.R. (2d) 58 (Div. Ct.), Morden J. made the following observations during the course of the judgment which he delivered orally on behalf of the Court:

.... We can take judicial notice, if it is not apparent from the *Labour Relations Act* itself, that members of the Labour Relations Board and in particular the chairmen of panels will have had experience and expertise in the law and labour relations. The Government of Ontario looks to people with such a background in making appointments....

(In that case the Court concluded that a reasonable apprehension of bias was not created by the fact that, a year prior to his appointment to the Board, the Vice-Chair assigned to chair the panel hearing the case had been employed by a law firm which provided legal services in labour law matters to a predecessor of the union that was the respondent in those proceedings.)

13. As is well known in the labour relations community of which Burns, Pinkerton's, and most of the other participants in the instant proceedings are a part, Board Members are appointed because of their experience and expertise in labour relations and associated areas of endeavour. The Board Members' biographic sketches in the Board's Annual Reports provide some indication of the breadth of their experience and expertise. For example, the biographic sketches contained in the 1988-89 Annual Report read as follows for the two Board Members on this panel:

HUGH PEACOCK

Mr. Peacock was appointed a full-time Board Member representing labour in November, 1986. Prior to joining the Board Mr. Peacock was Legislative Representative for the Ontario Federation of Labour which enabled him to gain broad knowledge of the legislative and political process in Ontario as well as its labour relations system. He came to the OFL after having been the Woodworkers' Education and Research Representative (1960-1961), worked in the UAW Canada Research Department (1962-1967), and having been a negotiator for the Toronto Newspaper Guild (1972-1976). Mr. Peacock was a member of the Ontario Parliament, representing Windsor West (NDP) from 1967 to 1971. He is currently a member of various social and community organizations.

W.H. (BILL) WIGHTMAN

Mr. Wightman was first appointed to the Board in 1968, becoming a full-time member in 1977, and resigned from the Board in April 1979, in order to serve as a member of the 31st Parliament of Canada and Parliamentary Secretary to the Minister of Labour. He was re-appointed as a

full-time Board Member representing management in May, 1981. Following 12 years as an industrial relations specialist in the petro-chemical, food processing and health care industries in the U.S. and Canada, he became Director of Industrial Relations for the Canadian Manufacturers' Association from 1966 to 1977. Concurrently, he served as the Canadian Employer Delegate and Technical Advisor to the International Labour Organization in Geneva and the Organization for Economic Co-operation and Development in Paris, and as a member of the Canada Manpower and Immigration Council, the Unemployment Insurance Advisory Committee and the Attorney-General's Committee on Prison Industries. He is a graduate of Clarkson University (BBA '50) and Columbia University (MS '54).

Thus, both Board Member Peacock and Board Member Wightman have parliamentary experience. If they were to be precluded from hearing any case involving an issue on which they may have had occasion to comment during the course of serving as a member of the federal or provincial parliament, or fulfilling the responsibilities of the various other positions which they have held, there would be few, if any, cases in which the Board would be in a position to avail itself of their expertise. Moreover, we are unanimously of the view that the above-quoted statements which Board Member Peacock made almost two decades ago as a Member of the Ontario Legislature would not cause reasonably well-informed persons to have a reasonable apprehension that he would render a biased decision in these proceedings, in violation of his oath of office. In view of our conclusion that Mr. Peacock's presence on this panel does not give rise to a reasonable apprehension of bias, it is unnecessary for us to comment upon the timeliness of the objection.

14. On September 5, 1989, after rendering the oral ruling quoted in paragraph 10 of this decision, the Board heard submissions concerning disclosure and a further request for an adjournment. After recessing to consider those submissions, the Board made a four part direction regarding disclosure and production, cancelled all of the hearing dates scheduled in the matter up to and including October 25, 1989, ruled that the matter would continue on October 30 and on the other (22) days previously scheduled, and further ruled that if the case was not completed within those days, it would continue on January 23, 24, 25, 30, 31, February 1, 6, 7, 8, 19, 21, 22, 27, 28, March 1, 12, 13, 15, and on Tuesday, Wednesday, and Thursday of each week thereafter until completed. (Some of those dates were subsequently cancelled by the Board on the agreement of the parties.)

III

Expert Evidence

15. On September 5, 1989, Mr. Shell provided opposing counsel and the Board with copies of the curriculum vitae of Professor Bob Hepple, whom he proposed to call later in the proceedings as an expert witness on behalf of the applicants and the intervening employees. Mr. Shell also provided opposing counsel and the Board with copies of a fifty-page paper entitled "The Freedom of Association of Security Guards in International and European Labour Law", written by Professor Hepple for use in these proceedings. The outline included in the paper's introduction reads as follows:

This paper deals with the freedom of association, including the right to bargain collectively, of security guards.

Part 2 considers this question under the Constitution and relevant Conventions and Recommendations of the International Labour Organisation (ILO), with particular reference to Convention No.87 (1948) which has been ratified by Canada. (There are other international instruments which refer to the freedom of association, such as Art.20(1) of the Universal Declaration of Human Rights, and art.22 of the International Covenant on Civil and Political Rights, but none of these has engendered a case law on the scale of that of the supervisory organs of the ILO. Accordingly, attention is restricted in this paper to the ILO and its case law.)

Part 3 considers the position under the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Council's European Social Charter (ESC), both of which have been ratified by a considerable number of democratic societies in Europe.

Part 4 provides an outline of the law and practice of nine such societies. The findings are summarised in the final section.

Each Part ends with conclusions, and there is a summary of these conclusions in Part 5.

The nine societies covered by Part 4 of the paper are Belgium, Denmark, France, the Federal Republic of Germany, Italy, the Netherlands, Spain, Sweden, and the United Kingdom.

16. When Mr. Shell sought to call Professor Hepple on December 18, 1989, opposing counsel raised a general objection to the admissibility of expert evidence in respect of freedom of association, and sought to have the Board hear and decide that issue prior to giving any consideration to Professor Hepple's qualifications. However, the Board ruled that it would permit Mr. Shell to call Professor Hepple to give testimony with respect to his qualifications, and would then hear submissions with regard to admissibility together with submissions concerning Professor Hepple's qualifications. After Professor Hepple had been examined by Mr. Shell and cross-examined by opposing counsel regarding his qualifications, counsel presented lengthy submissions on the issues of admissibility and expertise. We do not propose to detail those submissions, which occupied many hours of hearing time on December 18, 19, and 20, 1989. It is sufficient for purposes of the present decision to note that, having carefully considered all of the submissions and the authorities to which counsel referred, we have reached the following conclusions.

17. Under the procedure agreed to at the February 10, 1989 pre-hearing conference and subsequently adopted by this panel of the Board, the applicants and intervening employees are proceeding first with their evidence in chief regarding section 2(d) of the *Charter*. In the next phase of the case, the respondents and the other interveners will lead their evidence in response with respect to section 2(d) and their evidence in chief regarding section 1. The applicants and intervening employees will then lead their reply evidence concerning section 2(d) and their evidence in response with respect to section 1. The respondents and the other interveners will then lead their reply evidence concerning section 1. The Board has recognized, however, that there will inevitably be some degree of evidentiary overlap, since some of the evidence that is of arguable relevance to section 1 is also of arguable relevance to section 2(d). There has also been some suggestion by counsel that a non-suit motion may be made at the conclusion of the applicants' and intervening employees' evidence in chief regarding section 2(d).

18. Having carefully considered the matter, we have concluded that the objection to receiving Professor Hepple's evidence during this phase of the case should be upheld. We are not prepared to permit what in essence amounts to legal argument concerning the proper scope of freedom of association to be placed before us in the form of oral or documentary evidence. Unlike the marital status and conflict of laws cases cited by Mr. Shell (including *Sharif v. Azad*, [1966] 3 All E.R. 785 (C.A.); *Re Low*, [1933] 2 D.L.R. 608 (Ont. C.A.); *Parkasho v. Singh*, [1967] 1 All E.R. 737 (Div. Ct.); *Lazard Bros. v. Midland Bank*, [1932] All E.R. 571 (H.L.); *Camille Dreyfus v. I.R. Comrs.*, [1954] 2 All E.R. 466 (C.A.); *Wellington and others*, [1947] 2 All E.R. 854 (Ch. D.); *Lyon v. Lyon* (1959), 18 D.L.R. (2d) 753 (Ont. C.A.); and *Rouyer Guillet v. Jackson Knowland*, [1949] 1 All E.R. 244 (C.A.)), in which the nature of the substantive issues before the Courts required them to determine as a question of fact what the law of a foreign country was on a particular matter, in the section 2(d) phase of the instant case it is unnecessary to determine as a question of fact what freedom of association encompasses in other countries. It is, of course, open to counsel during the course of argument concerning section 2(d) to refer the Board to statutes, judgments, treat-

tises, and other sources of reference concerning freedom of association in other countries, and to attempt to persuade the Board to adopt, as a matter of law, a similar interpretation in the context of section 2(d). However, we are not persuaded that it would be an appropriate exercise of our discretion under section 15(1) of the *Statutory Powers Procedure Act* and section 103(2)(c) of the *Labour Relations Act* to admit expert evidence concerning such matters during this phase of the case which is being confined, as far as is practicable, to the case in chief of the applicants and intervening employees regarding section 2(d). (See, generally, the following authorities in which expert evidence was held to be inadmissible with respect to questions of law which were the responsibility of the adjudicators to determine: *R. v. Century 21 Ramos Realty* (1987), 37 D.L.R. (4th) 649 (Ont. C.A.); *R. v. Augustine and Augustine* (1986), 35 D.L.R. (4th) 237 (N.B.C.A.); and *Emil Anderson Const. Co. v. B.C. Ry. Co.* (1987), 15 B.C.L.R. (2d) 28, and 17 B.C.L.R. (2d) 357 (S.C.). See also Sopinka and Lederman, *The Law of Evidence in Civil Cases* (1974) at page 350.)

19. However, unless the Board allows a non-suit motion on the completion of the case in chief regarding section 2(d), such evidence will be admissible in the next phase of the case, in which evidence is to be adduced in respect of section 1. If the impugned portion of section 12 is a limit on freedom of association, the Board, in determining whether or not that limit is demonstrably justified in a free and democratic society, may well derive assistance from expert evidence concerning the scope of freedom of association and the limitations, if any, placed upon it in the context of security guards in other free and democratic societies. In this regard, we respectfully agree with the following observations made by Brian G. Morgan in his paper entitled "Proof of Facts in Charter Litigation", which forms Chapter 7 of *Charter Litigation* (1987), edited by Robert J. Sharpe, at page 179:

The nature of the law of other jurisdictions and countries may be a very important fact in determining whether a Canadian law or governmental act is "such reasonable limit ... as can be demonstrably justified in a free and democratic society" under s. 1 of the Charter. This must be distinguished from citing authorities from other jurisdictions in argument to support a particular legal construction of a Charter provision.

20. As indicated above, counsel also made submissions to the Board concerning Professor Hepple's qualifications. Mr. Shell submitted on behalf of the applicants and the intervening employees that Professor Hepple is an expert in the following four areas:

- (1) the law of the International Labour Organization (including its conventions and the "jurisprudence" of its various organs);
- (2) the law of the Council of Europe (including the European Convention on Human Rights and Fundamental Freedoms, the European Social Charter, and various bodies which enforce or interpret them);
- (3) British labour law; and
- (4) comparative European labour law.

21. Opposing counsel do not dispute Professor Hepple's expertise concerning those four areas (although with respect to the third area, counsel for Burns reserves the right to argue that Professor Hepple is not an expert regarding Scottish labour law). Moreover, without conceding the relevance of such evidence, they do not object to Professor Hepple being called to give expert evidence concerning the first three areas in the context of the section 1 phase of these proceedings. However, while acknowledging Professor Hepple's expertise in comparative European labour law, they contend that a comparativist cannot properly be called to give expert testimony in these proceedings.

22. Having reviewed Professor Hepple's curriculum vitae (which is Exhibit 100 in these proceedings) and Professor Hepple's oral evidence concerning his qualifications, we are satisfied that he is duly qualified to testify as an expert concerning each of the four areas listed above, including comparative European labour law. Professor Hepple is currently the Dean of Law and Head of the Department of Laws at University College, London. He holds four university degrees and has been a Barrister, of Gray's Inn, since 1966. For the past ten years he has been the chief editor of Volume XV (Labour Law) of the International Encyclopaedia of Comparative Law (Max-Planck Institute, Hamburg). He is also an editorial board member for the International Journal of Comparative Labour Law and Industrial Relations. He has a lengthy list of labour law and industrial relations publications, including a number pertaining to comparative labour law matters. His knowledge concerning European labour law has been derived from research, study, visitation, and discussions with legal experts from various European countries. Researchers and assistants have also gathered information for him. In preparing his paper on "The Freedom of Association of Security Guards in International and European Labour Law", he conducted additional research and made personal inquiries of people in the security industry. Although Professor Hepple is not, and does not profess to be, an expert on the domestic labour law of any European country other than Britain, his expertise in comparative European labour law is in our view sufficient to enable him to give expert testimony on that subject. Whether such evidence should be given less weight than that which might be accorded to the testimony of a series of experts who each have legal expertise concerning the labour law of specific European countries is a matter which may be addressed in final argument. As contended by counsel for the applicants and the intervening employees, that is merely a matter of the weight to be given to such evidence, and does not affect its admissibility.

DECISION OF BOARD MEMBER H. PEACOCK; January 31, 1990

1. In respect of Part III of this decision which deals with the admissibility of expert evidence I dissent.

2. Paragraph 17 of the decision describes the stages through which we are proceeding. We are now, in the 2(d) phase of the case, confronted by two enquiries:

- (a) What is the meaning of freedom of association in section 2 of the Charter, and
- (b) Does the section 12 bar to certification of a trade union that admits to membership persons other than guards, etc. violate that guarantee of freedom of association?

Obviously, we must answer (a) before we can answer (b). The first is not a question that can be answered in the abstract. The vague but meaningful generalities of the words of section 2, as they have been labelled, must be interpreted to produce a consequence that makes sense for working people in Ontario, their trade union representatives and their employers within the labour relations framework we administer.

3. How is the Board to approach the task of interpreting the words freedom of association? The decision of the majority would rule out what I consider to be an essential line of enquiry and a major source of information. In the section 2(d) phase of the case, my colleagues hold in paragraph 18 that it is unnecessary to determine as a question of fact what freedom of association encompasses in other countries. I do not agree. In its section 2(d) enquiry, the Board should be able to hear what *values* attach to freedom of association in free and democratic societies, not just what limits are imposed on the application or scope of freedoms enshrined in law. I give emphasis to the word values because in the submissions of counsel, and in the cases and commentaries they put before us, the word stands out as a clear guide to our approach to the construction of the Char-

ter freedom. If we are to attempt an examination of the meaning of freedom of association without the benefit of evidence about values held by societies similar to Canada, we may tend to narrow this Board's consideration of the analysis to our own immediate Canadian experience and its quite recent introduction to the business of testing the legal constraints on every day life against supposedly universal human values adopted into our Charter.

4. I do not contest that the determination of the meaning of the section 2 freedoms is a matter of law, just as is the determination of the scope of the section 1 reasonable limits that may be placed on those freedoms. But during the section 1 inquiry, facts may be put in and tested as to whether the limitations are reasonable or demonstrably justified in a free and democratic society. The purpose of the section 1 enquiry, therefore, is quite different from the section 2(d) enquiry.

5. How then is it more helpful, as a matter of practicality, to hear what freedom of association means by reference to "statutes, judgments, treatises and other sources of reference" (paragraph 18) as expounded by counsel in argument rather than discussed by a qualified expert such as Professor Hepple? I do not regard the opinions and conclusions of Professor Hepple, to which opposing counsel have objected, as attempts to persuade this Board to adopt the very same meaning he says is attributed to the freedom in the jurisdictions about which he is qualified to testify. This Board is competent to receive and weigh Professor Hepple's descriptions of the law of freedom of association in other jurisdictions as adjudicative facts. The admission of those facts may be of assistance to us, subject to their relevance to the 2(d) analysis and the weight that should be given to them, if any. If they go in as evidence, there is also the benefit of cross-examination and rebuttal evidence, which would not be available to the Board if they are excluded. If the applicant and intervening employees fail to make their case on the 2(d) breach question, the Board will have reached a decision without having had the opportunity to consider potentially important adjudicative facts which may well be relevant to our interpretative task. Thus, it is not sufficient to rely on evidence put in through the section 1 phase of the case even though it may well overlap with 2(d).

6. For these reasons I would exercise the Board's discretion and admit Professor Hepple's evidence in the manner described above for the purposes of the section 2(d) freedom of association enquiry as well as the section 1 enquiry.

1580-89-R International Union of Operating Engineers, Local 793, Applicant v. Russell H. Stewart Construction Company Limited, Respondent v. Group of Employees, Objectors

Certification - Fraud - Practice and Procedure - Reconsideration - Allegation that employee who circulated petition was union agent with no intention to file petition or appear before Board - Allegation, if true, may constitute fraud and abuse of Board's process - Matter set down for hearing

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *Bernard Fishbein, John Monti, Alcino Silveira* and *Dave Ottaway* for the applicant; *Henry Dinsdale, Robert Tout* and *Ronald Fetterley* for the respondent; *James E. Bowden* and *Randy D. Parks* for the objectors.

**DECISION OF KEN PETRYSHEN, VICE-CHAIR, AND BOARD MEMBER W. N. FRASER;
January 29, 1990**

1. This certification matter came on for hearing on January 12, 1990 for the purpose of hearing submissions (and, if the Board finds it appropriate, evidence) with respect to Randy Parks' request for reconsideration of the Board's decision dated October 20, 1989, as set forth in letters dated October 27, 1989 and November 2, 1989 from counsel for Mr. Parks. After entertaining the parties' submissions, which consumed the entire hearing day, the Board reserved its decision and advised the parties that it would attempt to advise them as soon as possible of its decision. We propose herein to simply provide the parties at this stage with our decision.
 2. The Board (differently constituted) issued a decision dated October 29, 1989 certifying the applicant to represent a bargaining unit of the respondent's employees. Randy Parks, an employee in the bargaining unit, seeks reconsideration of the Board's decision and bases his request on two relatively distinct grounds. It is alleged that the applicant utilized improper solicitation techniques in securing its membership evidence and the particulars of these allegations are contained in paragraphs 5-10 of the letter dated November 22, 1989 from counsel for Mr. Parks. At the hearing, counsel for Mr. Parks conceded that Mr. Parks did not exercise due diligence in investigating the matters and placing the allegations before the Board. After considering the parties' submissions on this aspect of the reconsideration request, the Board is satisfied that these allegations have been made in an untimely manner and, for this reason, the Board will not entertain them.
 3. In support of the reconsideration request, it is alleged that the application has been tainted by fraud. In this regard, Mr. Parks alleges in essence that an employee in the bargaining unit circulated a petition prior to the terminal date, but that this employee had never intended at any time to file the document with the Board, nor to appear at the hearing. It is alleged, as well, that this employee was acting in the capacity of "agent" for the applicant. We note that a petition was not filed with the Board prior to the terminal date. In our view, the allegations made by Mr. Parks on this aspect of his reconsideration request suggest a serious abuse of the Board's process, which may constitute fraud. After considering the parties' submissions, the Board (H. Kobryn dissenting) has determined that it will set this matter down for hearing in order to give Mr. Parks the opportunity to call evidence to support the allegations concerning the petition. The hearing for this purpose will be held on February 16, 1990.
 4. This matter is referred to the Registrar.
-

2207-89-R International Union of Operating Engineers, Local 793, Applicant v. Spider-Maple Lift Limited and/or Spider Waste Management Services and/or Innisfil Landfill Corporation, Respondent

Adjournment - Practice and Procedure - Counsel for respondent requesting adjournment on day before hearing - "Personal and business" reasons preventing respondent from retaining qualified counsel and preparing case - Request untimely and without cogent basis - Adjournment denied

BEFORE: *G. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *R. R. Montague*.

APPEARANCES: *Jack J. Slaughter* for the applicant; *M. Contini* for Spider-Maple Lift Limited; no one appeared for Spider Waste Management Services; *M. Contini* for Innisfil Landfill Corporation (for purposes of an adjournment request only).

DECISION OF THE BOARD; December 22, 1989

1. This is an application for certification. It came on for hearing on December 22, 1989. Mr. Contini appeared on behalf of the respondent Spider-Maple Lift Limited. He also appeared on behalf of the respondent Innisfil Landfill Corporation ("Innisfil") but advised the Board that his retainer in that respect was limited to requesting an adjournment on its behalf. No one appeared at the hearing on behalf of Spider Waste Management Services.

2. Mr. Contini advised the Board that Innisfil was seeking an adjournment on the basis set out in a letter dated December 21, 1989, as follows:

We wish to confirm that we are the general solicitors for Innisfil Landfill Corporation and have been requested by our client to seek your consent to an adjournment of the above-noted hearing. We were only able to contact Mr. Stephen Mernick, President of Innisfil Landfill Corporation, today to discuss this matter. His wife is pregnant and has suffered some complications recently and both personal and business matters have prevented him from retaining a qualified labour lawyer to deal with this matter. It may be possible that Mr. Contini, who is acting on behalf of the receiver appointed for Spider-Maple Lift Limited, may also be retained to act on behalf of Innisfil Landfill Corporation, but we do not yet know if the position of both corporations will be the same because Mr. Mernick has not yet had an opportunity to review the Form 10 filed on behalf of Spider-Maple Lift Limited by Mr. Contini, and to discuss the possible complications for the companies with his operational people.

We appreciate that you are not in your office today, and that this request is coming at a rather late date. However, we hope that you appreciate the reasons for this and we would ask you to contact the undersigned tomorrow morning to let us know what position you will be taking at the hearing.

We thank you for considering our request and look forward to hearing from you.

Mr. Contini had no further instructions and was therefore unable to assist the Board further.

3. Counsel for the applicant advised the Board that although he had not yet seen it, he understood that the letter Mr. Contini filed with the Board had been delivered to his office late in the afternoon on December 21, 1989, the day before the hearing. There had been no other or prior indication from Innisfil that it would be seeking an adjournment. The applicant opposed the adjournment request.

4. This application was filed on December 4, 1989. Notice of the application and of the

hearing scheduled for December 22, 1989 with respect to it, and all other material documents were sent to the respondents, including Innisfil, on December 8, 1989.

5. We are mindful of the maxim that labour relations laid are labour relations defeated and denied (see *Journal Publishing Co. of Ottawa Ltd. et al v. Ottawa Newspaper Guild, Local 205*, OLRB et al, March 31 1977, Ontario Court of Appeal, unreported). In recognition of that, and especially in certification proceedings, the Board will generally refuse to grant an adjournment except on consent of the parties or where it is satisfied that there are exceptional extenuating circumstances. The Board's discretion with respect to determining whether or not an adjournment should be granted is a broad one and a party which has had adequate notice of a hearing does not have a right to have it adjourned for the convenience of itself or its representative (*Re Flamboro Downs Holdings Ltd. and Teamsters Local 1879* (1979), 24 O.R. (2d) 400 (Div. Court)).

6. In this case, Innisfil's request for an adjournment was not, in our view, made in a timely manner. Nor was any cogent basis offered for the request. The request is based on some general and unspecified "personal and business" reasons. Even if Mr. Mernick's wife's complications are the personal reasons referred to, there is no indication of how or why either they or any other personal or unspecified business matters interfered with Innisfil's ability to either retain counsel or otherwise prepare with the application as scheduled. In the circumstances, the Board was not satisfied that there was any cogent reason for the application to be adjourned and Innisfil's request in that respect was denied.

7. On the basis of the material before the Board and the representations of the applicant and Spider-Maple Lift Limited, the application was withdrawn with leave of the Board as against Spider-Maple Lift Limited and Spider Waste Management Services. This left Innisfil Landfill Corporation as the sole remaining respondent. (At this point Mr. Contini excused himself from the proceeding.)

8. On the basis of the material filed and the representations of the applicant, the Board found that all employees of the respondent in the Township of Innisfil, save and except non-working foreman, and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. The Board was satisfied, on the basis of the evidence and material before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 18, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

10. Accordingly, the Board ruled, orally at the hearing, that a certificate shall issue to the applicant.

0201-89-R, 0040-89-G Sheet Metal Workers International Association, Local 562, Applicant v. Steelfabco Inc., Respondent

Accreditation - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer signing supplementary document to collective agreement between union and contractors association - Employer not member of association and signing subsequent to main parties - Employer not signing later agreement which extended terms of first agreement - Employer bound by bargaining relationship and accreditation provisions

BEFORE: *Inge M. Stamp*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn*.

APPEARANCES: *Bernard Fishbein* and *Cliff Coffin* for the applicant; *C. E. Humphrey* and *G. Goddard* for the respondent.

DECISION OF THE BOARD; January 22, 1990

1. The name of the respondent is amended to read: "Steelfabco Inc."
2. These are two applications before the Board. Board File #0040-89-G is a referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act*. Related to the section 124 referral is an application under section 63 and subsection 1(4) of the Act. On the day scheduled for hearing these matters, the parties agreed to put the issue raised in the respondent's reply, namely "whether there were bona fide bargaining rights created between Steelfabco and Sheet Metal Workers International Association, Local 562" before the Board. It was hoped that the determination of that issue would lead to a resolution of the outstanding issues between the parties.
3. The parties agreed on the facts and further agreed that there was no need to call any *viva voce* evidence. Counsel for the respondent and counsel for the applicant provided the Board with background information. The applicant filed with the Board the collective agreement (Exhibit 1) which it submits creates the bargaining rights that are at issue. Exhibit 1 is a collective agreement between The Waterloo - Wellington Sheet Metal Contractors Association and The Sheet Metal Workers' International Association, Local Union No. 562 dated July 30, 1975.
4. The pertinent sections of the agreement read as follows:

Article 2 - Recognition

Clause 1 - The Employer agrees to recognize the Union as the exclusive bargaining agent for all Journeymen Sheet Metal Workers and Registered Apprentices.

Clause 2 - The Union agrees to recognize the Employer as the exclusive bargaining agent for members of the Employer organization designated as constituting the Party of the First Part.

Clause 3 - Any obligation imposed upon the Parties by this Agreement shall be the joint and several obligations of:

1. The Party of the First Part

and

2. The Party of the Second Part.

...

Article 4 - Trade Jurisdiction

Clause - The terms of this agreement are hereby accepted as binding on both parties hereto and shall apply in the manner and under conditions specified herein to the manufacture, fabrication, assembling, handling, erection, installation, dismantling, reconditioning, adjustment, alteration, repairing, and servicing of all sheet metal work on No. 10 U.S., its equivalent or lighter gauge and all materials used in lieu thereof and all other work in connection or incidental thereto included in the jurisdictional claims of the Sheet Metal Workers' International Association and/or the Jurisdictional Disputes, Building and Constructional Industry. Balancing shall be the responsibility of the Sheet Metal Contractors. None but licensed Journeymen Sheet Metal Workers and Registered Apprentices recognized by the Union shall be employed on said work by the Employer excepting only the handling for transportation of materials and equipment mentioned above in and from the shop and/or warehouse and into designated storage place. The distribution of this material throughout the building shall be carried out by Local Union 562 members.

• • •

Article 6 - Union Security

Clause 1. - The Employer agrees it shall be a condition of employment for all employees to be a member of, and to maintain membership in good standing, in the Union.

Clause 2. - The Employer will co-operate with the Union in providing employment for their members and the Union agrees to assist by all means in their power, to secure the necessary qualified mechanics required by the Employer.

Clause 3. - If after a reasonable time (48 hours) suitable members of the Sheet Metal Workers' International Association are not available to meet the necessary requirements of the Employer, then the Employer may secure from other sources such additional Sheet Metal Workers as may be necessary, it being understood that such additional Sheet Metal Workers secured from other sources, shall be deemed to be members of the Local Union and parties to the Agreement, and licensed by the Ontario Department of Labour.

Clause 4. - The Company shall not subcontract any of their installation or erection work covered by Article 4 of this Agreement to any contractor or subcontractor unless said contractor or subcontractor is party to this Agreement.

Clause 5. - Notwithstanding anything contained in this Article the company shall not be required to discharge any employee to whom membership in the Union has been denied or terminated on some ground other than the refusal of such employee to tender the initiation fee and dues uniformly required in order to acquire and/or maintain membership in the Union unless the Company agrees that the grounds upon which the Union refused or terminated such employee's membership are valid, or in the alternative, unless the matter is referred to Arbitration in the manner hereinafter prescribed by the Agreement.

Clause 6. - The Union shall issue provisional cards to all new members and these cards may be revoked by the Joint Committee. A member leaving one shop to work at another shall have in his possession, by the following Friday, a work permit for his new place of employment. The Company shall inform the Union when such employees are hired or leave their employ. Any employee shall be dismissed for a valid reason after the Joint Committee has reviewed said valid reason.

Clause 7. - A Senior Mechanic (55 years and over) shall not be discriminated against because of his age.

Clause 8. - Summer Help

Students specializing in sheet metal shall have preference as far as summer help is concerned, such students shall be cleared by the Union. Employers having unemployed registered apprentices shall not hire summer help.

ARTICLE 24 - Duration of Agreement

Clause 1 - All provisions of this Agreement shall continue in force and effect beginning with the date of ratification, through to April 30th, 1977 and from year to year thereafter unless either party gives notice to the other party hereto of an intent to terminate or amend this Agreement.

Clause 2 - Such notice shall be given in writing not earlier than ninety (90) days and not later than thirty (30) days before expiry date of this Agreement or any subsequent period in which the Agreement remains in force.

5. The collective agreement that the applicant contends creates the bargaining rights was signed in 1975. The signing page is the second last page in the document and reads as follows:

Signed on behalf of:

THE WATERLOO-WELLINGTON SHEET METAL CONTRACTOR'S ASSOCIATION

J. J. Hergott "J. J. Hergott"

J. M. Rozell "J. M. Rozell"

C. A. Bondy "C. A. Bondy"

Signed on behalf of:

THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL UNION
562

R. Hohl "R. Hohl"

R. Zuccala "R. Zuccala"

G. Schneider "Grant Schneider"

C. Coffin "C. Coffin"

SIGNED THIS 30th day of July 1975.

Members of the Waterloo-Wellington Sheet Metal Contractor's Association:

N. W. Clayton Ltd.	S. E. Rozell & Sons Ltd.
Hebel Sheet Metal Ltd.	Sutherland-Schultz Limited
Hutchison Sheet Metal Ltd.	Brathwaite Roofing Ltd.
Nelco (Kitchener) Ltd.	Thackeray Roofing Ltd.

Non-members of the above association:

Walden Roofing Co. Ltd. "Illegible"

Galt Roofing & Sheet Metal Co. Ltd. "Illegible"

Pernfuss Roofing Co. Ltd. "Illegible" 12/13/75

K & B Sheet Metal Co. "Illegible"

Steelfabco "G. Goddard" Nov. 16 1976

Rampart Metal Erectors Ltd. "Illegible" Pres. Jan. 17/77

Mr Crane Limited "Illegible" /3/77

6. As can be seen, non-members of the Association signed separately and on different dates. Steelfabco signed this document on November 16, 1976.

7. The Waterloo-Wellington Sheet Metal Contractors Association was accredited as the bargaining agent for all employers of sheet metal workers and sheet metal workers' apprentices in the Counties of Waterloo, Wellington, Frey and Perth, except the townships of Blanchard, Downie, Fullerton, Hibert and Logan in the industrial, commercial and institutional sector of the construction industry. The certificate names the members of the Association at the time and adds: "and such other employers for whose employees of the Sheet Metal Workers' International Association, Local Union 562, 124 Sydney St. S., Kitchener, Ontario, may after August 4th, 1972 obtain bargaining rights through certification or voluntary recognition in the geographic area and sector as set out in the unit of employers described herein".

8. The employer and employee bargaining agency designations for the sheet metal trade were issued on March 21, 1978 and amended on April 12, 1978.

9. Goddard and his partner Ross started their own business. Both were members of Local 562. The partners ultimately went their separate ways around November 1976. Eventually, Goddard's membership in the Union lapsed. Goddard continued on his own and Steelfabco was subsequently incorporated. On November 16, 1976 G. Goddard put his signature on the signing page of the 1975-1977 collective agreement.

10. During conversations between Goddard and Coffin, the Business Manager of Local 562, Coffin's impression was that Steelfabco is primarily involved in the production of heavy metal items and was not doing any sheet metal work. The sheet metal work prompting the section 124 grievance was done in 1988 on the Butler Metal job. Goddard's recollection of the essence of these conversations is that the union indicated its intention to unionize Steelfabco.

11. Steelfabco did not become a member of the Waterloo-Wellington Sheet Metal Contractors Association. Another agreement between the union and the Contractors Association was negotiated from 1977 until 1978 when province-wide bargaining came into effect. Goddard (on behalf of Steelfabco) was not involved in the negotiations, nor did he sign the 1977-1978 agreement. The 1977-1978 agreement was a short document basically extending the 1975-1977 agreement with some alteration in wages.

12. For purposes of this argument, the Board has been asked to assume that Steelfabco Inc. is the successor to Steelfabco.

13. The applicant submits that pursuant to the accreditation provision of the Act, all contractors for whom the Union holds bargaining rights would be bound to the agreement with Local 562 and the accredited employer organization. The bargaining rights would only affect a small portion of Steelfabco's business. Seventy employees are engaged in the heavy metal part of the company, and at the present time there is only one sheet metal journeyman and one sheet metal apprentice.

14. The applicant's position is that Exhibit 1, the 1975 agreement, creates bargaining rights for the Union. Steelfabco was added to the agreement between the Association and the Union. Goddard signed on behalf of Steelfabco. It was an agreement setting out the terms of employment. The definition set out in section 1(1)(e) of the *Labour Relations Act* requires that the agreement be in writing. Exhibit 1 is in writing and is signed by the Union and by Goddard on behalf of Steelfabco. The Act does not require that the signatures be affixed at the same time. In *City Plumbing (Kitchener) Limited*, [1985] OLRB Rep. Nov. 1566, the company signed an existing agreement

which had expired at the time of signing, and the Board held that the company was bound to the collective agreement.

15. Applicant counsel's argument with respect to the issue of abandonment raised by the respondent is summarized as follows. The agreement was signed on November 16, 1976. On its face, it expires on April 30, 1977. Pursuant to subsection 52(1), the agreement is deemed to be for a one-year period, and since Steelfabco is not and was not a member of the Association subsection 52(4) does not apply. Therefore, the applicant contends that the agreement as it applied to Steel-fabco ran until November 16, 1977. The designations became effective in March 1978 and provincial bargaining started in May 1978. Whether anything was signed in the interim between Steel-fabco and the Union is irrelevant. The accreditation provisions operate to bind Steelfabco. After 1978, there is no abandonment issue due to the statutory provisions in the construction industry. The period of time between the 1975-1977 agreement signed by Goddard and the provincial bargaining scheme is between one year or, if section 52 were to apply, five or six months. However, the applicant's position is that not only is there no abandonment under the provincial bargaining scheme, but there cannot be any abandonment when the Association is an accredited bargaining agent because it too is a statutory scheme. The cases cited in support of the applicant's position are: *Culliton Brothers Limited*, [1982] OLRB Rep. March 357; *Thomas Construction (Galt) Limited*, File #0035-82-M, unreported decision dated July 9, 1982; *Inducon Construction (Northern) Inc.*, [1982] OLRB Rep. March 390; *Lorne's Electric*, [1987] OLRB Rep. Nov. 1405; and *Ouellette & Rochefort Ltd.*, [1971] OLRB Rep. Apr. 218.

16. In summary, the applicant submits that no abandonment existed after 1978 and no abandonment applied prior to 1978 due to the accreditation provisions of the Act. There was a valid agreement signed in 1976, and the Board cannot infer that the Union intended to abandon its bargaining rights.

17. In the respondent's view, this case is a technical one. The respondent has been in business for 13 years. A document was signed 13 years ago and nothing has been heard from the Union for 13 years. The respondent has built up his business without reference to a trade union. The position the respondent takes is that it is not, and never has been, a party to a collective agreement with the Trade Union. The issue is not what was intended by the parties when Exhibit 1 was signed, but rather what the parties accomplished. Did they actually make a collective agreement? The crucial words in subsection 1(1)(e) are "an agreement in writing". The cases cited are *The United Steelworkers of America v. Canada Machinery Corporation Limited*, (1961) CLLC ¶16,194; and *Marsland Engineering Limited*, [1970] OLRB Rep. Apr. 133.

18. It is the respondent's position that there is no collective agreement in this case because no agreement signed by Steelfabco was ever signed by the Trade Union. The act of Steelfabco putting its signature to an agreement between two other parties does not make the document an agreement signed by Steelfabco and the Union, because the union never signed it as a document between itself and Steelfabco, but only as a document between itself and the Association. Steelfabco did not make an agreement pursuant to subsection 1(1)(e) of the Act. The Board dealt with this issue in *R. T. Construction*, [1971] OLRB Rep. Sept. 593 and in *Jimmy's II*, [1977] OLRB Rep. Sept. 572. The respondent submits that the same reasoning set out in the above cases should be followed. In both cases, there was only one signature on the supplementary document, separate from the master agreement. The Board found that the supplementary document is not an agreement unless both parties sign the document. The fact that the signature for Steelfabco is on the bottom of the page rather than on a separate document does not change the analysis. The Union's signature on this document for the purpose of the collective agreement with the Association is not a signature for the purpose of an agreement with Steelfabco.

19. There are two issues before the Board. First, were bargaining rights created between Steelfabco and Local 562 through the collective agreement signed by Steelfabco? If the answer is "yes", was there any abandonment between 1977 and 1978 when the provincial bargaining scheme became effective.

20. An agreement must be in writing, signed by the parties to the agreement, dated, "containing provisions respecting terms or conditions of employment". The signatures need not be contemporaneous. The document placed before the Board was signed by the parties that negotiated the agreement. Additional parties, who were not members of the accredited association, signed the document at different times throughout the life of the agreement. The accreditation order designates the Association as exclusive bargaining agent for any employers (whether they are members of the Association or not) for whose employees Local 562 obtains bargaining rights.

21. The evidence before the Board consists of the accreditation order, the 1975-1977 agreement and the provincial bargaining designations. The respondent's position is that since the Union's signature was not affixed for a second time, the document is meaningless. The non-members of the Association, including Steelfabco, signed a document that was already signed by the Union and the accredited Employers Association. From the composition of the document, it is reasonable to assume Steelfabco understood the nature of the document and that it was in fact binding itself to an existing agreement. The fact that the Union did not sign again on the same page does not make this document deficient. If there had been a separate page or a supplementary memorandum with only one of the parties' signature, it would be a different case than the one before us. The document before us is a complete agreement with a signing page attached to it. We find that Steelfabco, by putting its signature to that document, bound itself to an existing collective agreement, thereby creating bargaining rights between Steelfabco and Local 562. Exhibit 1 is a collective agreement in effect between the applicant and the respondent.

22. With respect to the abandonment issue, there is no evidence before us that would cause the Board to find that the Union had abandoned its bargaining rights prior to 1978 when provincial bargaining came into effect.

23. Having regard to the above, it is not necessary to address the applicant's submissions with respect to the applicability of section 52 in the circumstances of this case.

24. The Board notes that the issue of whether bargaining rights existed was dealt with first on agreement of the parties. The Board directs the parties to advise the Registrar if further hearing dates are necessary. This panel will remain seized should there be any outstanding issues.

2183-89-R Clarence Edwin Muir, Applicant v. Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 91, Respondent v. Acklands Limited by Uni-Select Inc., Intervener

Termination - Timeliness - Termination application timely only if brought after latest-occurring of statutory scenarios - Twelve months not having elapsed from appointment of conciliation officer - Appointment untimely

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

DECISION OF THE BOARD; January 19, 1990

1. This is an application for a declaration that the respondent no longer represents the employees of the intervener at its branch in Ottawa. The matter was initially scheduled for hearing on January 10, 1990, but that hearing was adjourned on the agreement of the parties.

2. The copy of the collective agreement that was filed by the applicant together with his (Form 17) application includes the following duration clause:

ARTICLE 19 DURATION OF AGREEMENT

19.01 This Agreement shall be effective from the 1st day of September, 1987 until the 31st day of August 1989 and shall continue automatically thereafter for annual periods of one year each, unless either party notifies the other, in writing, not less than thirty (30) days and not more than ninety (90) days prior to the expiration date that it desires to amend or terminate the Agreement.

3. The application was filed with the Board on November 30, 1989. Documents filed with the Board by the respondent indicate that, pursuant to Article 19 of the collective agreement and section 53 of the *Labour Relations Act*, on June 12, 1989 the respondent sent notice to bargain to the intervener by registered mail. They further indicate that on September 18, 1989, a conciliation officer was appointed, pursuant to section 16(1) of the Act, to confer with the parties and endeavour to effect a collective agreement, and that on October 30, 1989, the Minister, pursuant to section 19(b) of the Act, informed the respondent and the intervener by notice in writing that he had decided not to appoint a conciliation board.

4. It is the respondent's position, as set forth in letters to the Registrar dated December 14, 1989 and January 5, 1990, that this application is untimely. It is the applicant's position, as set forth in his letter dated January 8, 1990, that the application is timely by virtue of section 61(2)(c) of the Act.

5. Section 61(2) provides as follows:

Where notice has been given under section 53 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operate or the date when the Minister appointed a conciliation officer or a mediator, whichever is later, unless, following the appointment of a conciliation officer or a mediator, if no collective agreement has been made,

- (a) at least twelve months have elapsed from the date of the appointment of the conciliation officer or a mediator; or

- (b) a conciliation board or a mediator has been appointed and thirty days have elapsed after the report of the conciliation board or the mediator has been released by the Minister to the parties; or
- (c) thirty days have elapsed after the Minister has informed the parties that he does not consider it desirable to appoint a conciliation board,

whichever is later.

[emphasis added]

6. In the absence of the last three words of that subsection, it might be argued that this application was timely by virtue of being filed thirty-one days after the Minister informed the parties that he had decided not to appoint a conciliation board. However, the last three words of section 61(2) - "whichever is later" - make it clear that, in the circumstances of this case, an application of this type cannot be filed before September 18, 1990, which is the later of twelve months after the conciliation officer appointment, and thirty days after the Minister notified the parties that he did not consider it desirable to appoint a conciliation board. (If the respondent and the intervener enter into a new collective agreement prior to September 18, 1990, the earliest date on which a termination application can be filed will be further deferred to the start of the "open period" specified in section 57(2) of the Act.)

7. In view of our conclusion that this application is untimely, no useful purpose would be served in relisting it for hearing. For the foregoing reasons, this application is hereby dismissed.

0815-89-OH Everettte Chapelle, Complainant v. Toronto Transit Commission Wheel Trans Department, Respondent

Health and Safety - Complainant alleging dismissal for exercising rights under Occupational Health and Safety Act - Complainant using various statutory provisions to pressure employer to shorten shift - Complainant dismissed for refusal to work assigned shift - Complaint dismissed

BEFORE: *R. A. Furness*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballentine*.

APPEARANCES: *Everette Chapelle* for the complainant; *G. F. Luborsky*, *R. A. Winter*, *B. Stringer*, *K. J. Worthy* and *P. B. Chatoff* for the respondent; *David E. Gaudette* for Amalgamated Transit Union, Local 113.

DECISION OF THE BOARD; January 26, 1990

1. The name of the respondent is amended to read: "Toronto Transit Commission Wheel Trans Department".

2. The complainant has made a complaint under section 24 of the *Occupational Health and Safety Act*. It is the position of the complainant that the respondent has contravened section 24(1) of that Act.

3. In the complaint Mr. Chapelle has alleged that on or about May 8, 1989, he was dealt with by Peter Chatoff, the acting superintendent operations of the respondent, contrary to the provisions of section 24 of that Act in that he did on his own behalf or on behalf of the respondent as follows:

Did Violate section 16 of the Occupational Health and Safety Act and did deny me the right to exercise my rights under section 17 of the same Act. Further the company violated section 24 of the O.H.&S.A. by terminating my employment because I exercised my rights.

On May 1st, 1989 after working 14 hours and 15 minutes and because of a tight Schedule I observed two 15 minute breaks. On these breaks I only found time to consume two cups of coffee. Having no time to order a sandwich and consume same. After working over 14 hours without a meal break or sandwich I found myself exhausted and fatigued (sic). I notified control that I would be stopping on the way in to the garage for a bite to eat. Upon returning to the garage I notified the company that I would be refusing to work under section 23 of the O.H. & S.A. and requested the Ministry be brought in. The Ministry found I had no complaint under section 23.

On May 8th, 1989 at 5.45 a.m. I met with Mr. Peter Chatoff. I informed Mr. Chatoff that the company was in violation of section 18 of the *Employment Standards Act* and that under section 17 of the O.H. & S.A. I am bringing this hazard to his attention. Mr. Chatoff would not address my complaint but did terminate my employment. I feel this is a reprisal for exercising my rights under the O.H. & S.A.

The complainant has requested the following remedy:

Reinstate with back pay, seniority and beifits (sic) plus interest and to include paid up contributions to the Canada Pension Plan from 1985 to date. Due to the ongoing circumstances (sic) of the company refusing to address this issue over the years.

4. In its reply the respondent denied any violation of the *Occupational Health and Safety Act*. It was the position of the respondent that the essence of this complaint is an allegation that the respondent violated provisions of the *Employment Standards Act* and that the Board was without jurisdiction to deal with this matter. It was also the position of the respondent in its reply that the complainant had for at least four years been scheduled on the shifts complained of herein. It was the further position of the respondent that the complainant had the option to exercise his seniority to bid into shifts of lesser duration, but chose not to do so. The respondent submitted that the instant complaint is an abuse of the Board's process and that the complainant is estopped from challenging the propriety of the shift assignments that he himself selected.

5. Section 24(1) of the *Occupational Health and Safety Act* provides:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

The issue which is raised in this complaint is whether the respondent or a person acting on behalf of the respondent has dismissed the complainant because he has acted in compliance with the

Occupational Health and Safety Act or the regulations or an order made thereunder or has sought enforcement of the *Occupational Health and Safety Act* or the regulations.

6. The complainant prior to the termination of his employment was a driver of a Wheel Trans vehicle for the handicapped. He had been employed in this capacity both by the respondent and formerly by a predecessor employer which had previously operated Wheel Trans vehicles for the handicapped. During the early months of 1989, the complainant had informed the respondent that, in his view, it was in breach of various provisions of the *Highway Traffic Act* and the *Employment Standards Act*. These matters were addressed to and the respondent concluded that it was not in violation of the provisions referred to by the complainant. An Inspector's Daily Report dated April 17, 1989, notes that the complainant refused to work past 3:55 p.m. due to the *Occupational Health and Safety Act* and the *Employment Standards Act*. His vehicle was left at an address in Toronto and the complainant was driven to see Mr. Chatoff. It was necessary for the respondent to dispatch a serviceman to return to vehicle to its proper location. The complainant informed Roger Winter, superintendent operations, that he refused to work later than 3:55 p.m.

7. The evidence established that Mr. Chapelle, by virtue of his seniority, had the opportunity to bid on a selection of ten hours, four day work week shifts. He expressed the view that he did not wish to continue to work thirteen hour shifts because these hours of work were taxing and rendered him too fatigued to safely perform his duties. He acknowledged the existence of ten hour, four day work week shifts but rejected the off-days which were available because these off-days did not suit his life style. Mr. Chapelle's life style required that he not work on Saturdays and Sundays. An inspector from the Industrial Health and Safety Branch of the Ministry of Labour investigated the complaint by Mr. Chapelle under the *Occupational Health and Safety Act*. The inspector in his report dated April 19, 1989, did not conclude that a violation of the *Occupational Health and Safety Act* had occurred. The inspector noted that Mr. Chapelle's complaint about the hours he had worked was outside the *Occupational Health and Safety Act*. As this point the respondent expected Mr. Chapelle to resume his duties on his next scheduled working day of April 22, 1989. Mr. Chapelle was advised that he had the right to appeal the decision of the inspector. However, it was made clear by the inspector that if Mr. Chapelle exercised his right of appeal he must continue his duties while the process of appeal was in progress.

8. On May 1, 1989, a further operating irregularity occurred with respect to Mr. Chapelle. At 6:26 p.m. he advised the respondent's control that after his last drop-off he would be stopping for something to eat on his way back to the Lakeshore Garage. Later at 7:14 p.m. he called control and advised that he was finishing his supper at home and would be returning the bus to the garage later. Upon returning to the garage at 8:00 p.m. he submitted a claim for one hour and fifteen minutes overtime. Mr. Chapelle was advised by an official of the respondent that, as a matter of policy, the respondent did not pay operators for time spent performing other than assigned duties, such as dining. Mr. Chapelle responded that if overtime was not sanctioned by the respondent he would be filing a grievance. On May 4, 1989, Mr. Chapelle was advised by Mr. Chatoff that the taking of a vehicle belonging to the respondent to a private residence and having it lay over there while having supper was an error and must not re-occur, that overtime pay for stopping en route to eat was not in order and would not be given and that the correct operating procedure was to return to the garage directly from the last drop-off after clearing with control.

9. A further incident occurred at 5:50 p.m. on May 6, 1989, when Mr. Chapelle contracted control to advise that his schedule was in violation of section 18 of the *Employment Standards Act*. He was advised by dispatch to carry on and report it to the supervisor upon the completion of his shift. At 7:10 p.m. the shift supervisor of the respondent received a phone call from Mr. Chapelle who indicated that the duration of his shift was over twelve and a half hours. He asked dispatch to

move his last call or have someone meet him at the drop location in question to drive him back to the yard. Mr. Chapelle was told to carry on with his last pick-up and telephone from the drop location in question. At 7:55 p.m. Mr. Chapelle phoned to say that he was clear of his last drop-off and inquired whether someone was going to pick him up. He was instructed to bring the bus back to the yard and that he was expected to complete his shift in accordance with the collective agreement and file a grievance later. During the telephone conversation Mr. Chapelle declined to comply with this instruction and again demanded whether someone was going to pick him up. At 8:30 p.m. Mr. Chapelle reported back to the yard with his vehicle and was interviewed by the shift supervisor. Mr. Chapelle was warned that he was obligated to return his vehicle to the yard and that it was a serious incident to refuse. He was asked if he saw any problem with his assigned shift for May 7 and he indicated that should he be scheduled on a crew of more than twelve and half hours he might not even pick-up the patrons in the next instance. At this point he was requested to see the office supervisor on Monday morning when he reported.

10. On May 8, prior to commencing his shift at 5:45 a.m., Mr. Chapelle was interviewed by Mr. Chatoff regarding the incident on May 6. The events of May 6 were reviewed and while Mr. Chapelle agreed that he understood the proper procedures he stated that he had presented the matters previously and had received no satisfaction. Mr. Chatoff stated that he understood that the shifts were in order and that Mr. Chapelle must perform his entire duties. When Mr. Chatoff asked him if he would complete his entire thirteen hour shift, he replied that he would work but not complete an entire thirteen hour shift on May 8. Since Mr. Chapelle was scheduled to work a shift of thirteen hours on that date, Mr. Chatoff again asked him if he would complete his entire thirteen hour shift that day. Mr. Chapelle responded that he would not and that he would be calling in later to have adjustments made to his last call so as to finish within twelve and a half hours. The reaction of Mr. Chatoff was to inform Mr. Chapelle that he was compelled to relieve him from duty and that the matter would be dealt with at the next level by Mr. Winter, the acting manager of the Wheel-Trans Department.

11. On May 9 there was a meeting between Mr. Winter and Mr. Chapelle. The former reviewed the reports from Mr. Chatoff. It was the position of Mr. Chapelle that the respondent was in violation of section 18 of the *Employment Standards Act*. There was some discussion whether the permit under that Act was for a thirteen hour shift (twelve and half hours with two fifteen minute breaks). Mr. Chapelle reiterated that he would not work thirteen hour shifts. Mr. Winter suggested that Mr. Chapelle had sufficient seniority to sign on for a ten hour shift. This was rejected by Mr. Chapelle who would not compromise on his views. Mr. Chapelle left the meeting and declared that he would go on to the Ontario Labour Relations Board and file a grievance. On May 10 Mr. Winter upheld the decision to dismiss Mr. Chapelle.

12. It is the finding of the Board that Mr. Chapelle was dismissed from his employment with the respondent because of his refusal to work his assigned shift. During the meetings on May 6 and 8 there was no reference to the *Occupational Health and Safety Act* by Mr. Chapelle. During those two meetings his attention was focused on the *Employment Standards Act*. At an earlier point in time Mr. Chapelle channelled his energies towards a consideration of the *Highway Traffic Act*. It appears to the Board that Mr. Chapelle knew exactly the hours and days of the week he wished to work. If he worked the thirteen hour shifts he could apparently enjoy his preferred days of leisure. On the other hand if he was prepared to work the ten hour shifts he could not always enjoy his preferred days of leisure. He was unwilling or unable to work the thirteen hour shifts and therein lay his dilemma. It further appears that Mr. Chapelle determined that his appropriate response was to try and shorten his thirteen hour shift to a customized length of his liking. To this end he endeavoured to keep the pressure on the respondent by raising spurious allegations that the respondent had variously violated the *Highway Traffic Act*, the *Employment Standards Act* and the

Occupational Health and Safety Act. In this complaint we are dealing directly with only the latter Act. An investigation by an inspector under that Act failed to disclose any violation thereof. The evidence before the Board completely fails to disclose a violation of any section of the *Occupational Health and Safety Act*. This complaint is accordingly dismissed.

1868-89-R Amalgamated Transit Union Local 616, Applicant v. Transit Windsor, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Employee - Employer seeking exclusion of operations supervisors - Predecessor position excluded by Board decision involving same union and employer for different bargaining unit ten years earlier - Exclusion issue not raised in subsequent bargaining - Application of *res judicata* or estoppel inappropriate - Passage of time and change in title providing credible context for assertion of changed circumstances warranting review - Interim certificate not precluding commencement of bargaining - Interim certificate issuing

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *R. W. Pirrie* and *B. L. Armstrong*.

APPEARANCES: *Paul Falzone*, *Ronald Seguin* and *Robert L. Saarinen* for the applicant; *Patrick F. Milloy*, *Robert Coghill* and *Stephen Harrison* for the respondent; *Kenneth Alan McLaughlin* for the group of employees.

DECISION OF JUDITH MCCORMACK, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG; January 25, 1990

1. This is an application for certification where the parties met with a Board Officer on the day scheduled for hearing, and were able to clarify a number of the disputes between them. Since the applicant had not established its status as a trade union before the Board previously, the Board first heard evidence in this regard.

2. The applicant is a local union of the Amalgamated Transit Union, an entity which has already proved that it is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. The applicant conducts its affairs in accordance with the constitution and general laws of its parent, which, among other things, provide for certain local by-laws. It is governed by local officers which include a president/business agent, a vice-president, a financial secretary, a garage committeeman and a drivers' committeeman. The local officers are elected for three-year terms and their duties are set out in detail in the constitution. The constitution also requires monthly meetings, sets out the procedures for the holding of such meetings and provides the order of business at them. Membership eligibility provisions are included along with procedures for admitting persons into membership. To be a member in good standing, among other things, an individual is required to promise to uphold the constitution. The objects provided in the constitution include the following:

To place our occupation upon a higher plane of intelligence, efficiency and skill;... to encourage the settlement of all disputes between employees and employers by arbitration; to secure employment and adequate pay for our work, including vacations with pay and old age pensions; to reduce the hours of labour and by all legal and proper means to elevate our moral, intellectual and social condition.

3. There are approximately two hundred and fifteen employees in the local at the present time. The applicant and the respondent have been in a collective bargaining relationship for at least fifty years with respect to a unit of drivers and maintenance employees. In this capacity, the applicant has negotiated successive collective agreements and has initiated grievance arbitrations. The most recent collective agreement between the applicant and the respondent with respect to this drivers' unit runs from February 29th, 1988 until February 28, 1991. In the application before us, the applicant now seeks to represent a tag-end unit of various other employees.

4. Although the applicant's charter from the parent body was unavailable as a result of its antiquity, the applicant is recognized as a local union by the Amalgamated Transit Union and participates in its activities including international conventions. On the basis of its membership, the local is entitled to one voting delegate at these conventions.

5. While the evidence in this case was less comprehensive than we might have required in other circumstances, there was no doubt that the applicant was a fully functioning organization whose purpose was to represent employees in labour relations. Its history of labour relations and organizational activity indicates that the applicant has been operating as a *de facto* trade union for over fifty years. In these circumstances, we were persuaded that the applicant was a viable organization of employees for the purpose of labour relations, and we determined that it was a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

6. The parties agreed in part on the following bargaining unit description (underlined portions remain in dispute):

all employees of the respondent in Windsor save and except (*supervisors*), persons above the rank of supervisor, secretary to the General Manager, secretary to the Operations Manager, (*the Human Resources clerk*), (*Accountant*), the Transportation Schedule, (*the Transportation Secretary*), the Purchasing Agent, the Transportation Planner, persons regularly employed for not more than (24) twenty-four hours per week, students employed for the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of October 31, 1989.

7. The respondent took the position that Ann Rezler, Human Resources Clerk, Tom Bondy, Accountant, Brenda Colley, Transportation Secretary, Marcia Matthews, Cash Office Supervisor and Jo-Ann Taylor, Payroll Supervisor should be excluded from the bargaining unit on the basis that they performed managerial functions and were employed in a confidential capacity in matters relating to labour relations. The applicant argued that all these persons should be included within the bargaining unit on the basis that they were employees as defined by section 1(3)(b) of the *Labour Relations Act*. As a result, we appointed a Labour Relations Officer to inquire into and report back to the panel on the duties and responsibilities of the persons described above.

8. The respondent also took the position that Tom Bondy should not be in the bargaining unit whether or not he was found to exercise managerial functions or to have been employed in a confidential capacity, because when the parties met with the Labour Relations Officer to discuss the bargaining unit, the applicant initially agreed to exclude "the accountant" from the bargaining unit. When it reviewed the employee lists, however, the applicant changed its position and asserted that Mr. Bondy, who is listed as an accountant, should be included in the unit. As a result, the respondent argued that the applicant was gerrymandering, and that Mr. Bondy should not be included in the bargaining unit regardless of the duties he performed. There is no dispute that the applicant changed its position before the count was announced.

9. The applicant told the Board that it had originally agreed to the exclusion of "the accountant" on the basis that this title referred to an individual they considered to be part of man-

agement, one Charles McLean, whom the company later described as the financial manager. However, the applicant did tell the company that they considered everyone working below Mr. McLean to be in the bargaining unit. It was only when they reviewed the employee lists that they discovered that Mr. Bondy, who works under Mr. McLean, was described as the accountant. The respondent then advised the Board that it wished to call evidence to show that the applicant was aware that Mr. Bondy was the accountant.

10. The Board decided that it would not determine this dispute as a preliminary matter. Rather, we advised the parties that, without commenting on the merits of the respondent's argument, if the respondent wished to pursue it further it would have the opportunity to call its evidence and to make submissions before the panel after the Labour Relations Officer had reported back on Mr. Bondy's duties and responsibilities.

11. The respondent also took the position that ten operations supervisors should be excluded from the bargaining unit on the basis that they exercised managerial functions. However, counsel argued that we should not inquire into their duties and responsibilities in this regard, but that we should simply dismiss that part of the union's application pertaining to these persons. His reasoning was based on the fact that in 1979 the Board decided that transit inspectors, the predecessors to the operations supervisors, should be excluded from the unit of drivers and maintenance employees referred to earlier on the basis that they exercised managerial functions. Since the applicant represents that bargaining unit as well, and as it has not challenged that exclusion since the Board's decision, the respondent asked us to dismiss that part of its current application, citing in this regard *Park Lane Nursing Home Limited*, [1981] OLRB Rep. July 945 and *The Windsor Star*, [1988] OLRB Rep. April 427.

12. The applicant argued that the decision was made ten years ago with respect to a different bargaining unit and that the two cases cited were inapplicable. Counsel asserted that the operations supervisors were "employees" within the meaning of the *Labour Relations Act* and asked us to appoint a Labour Relations Officer to inquire into their duties and responsibilities. The Board reserved its decision on this issue, which we now provide.

13. It appears that transit inspectors were considered to be employees within the bargaining unit of drivers and maintenance employees from 1964 until 1979. In 1979 an application was made under section 95 [now section 106(2)] for a determination of their status as employees. The Board issued a decision in March of 1979 to the effect that the transit inspectors exercised managerial functions. As a result, they were excluded from that unit. Since that time, successive collective agreements negotiated by the parties with respect to that unit have not covered inspectors or their successors, the operations supervisors. This issue was not raised at any time by either party during negotiations.

14. The Board has wrestled with the problems presented by this kind of situation both in the context of section 106(2) applications and in other kinds of proceedings. Its jurisprudence identifies two themes: the need for stability and finality in labour relations, and the recognition that labour relationships evolve and change. The first element has led the Board to take an approach drawing on the doctrine of *res judicata* where there has been an earlier Board finding, and reminiscent of estoppel where there has been a prior agreement between the parties. The Board reviewed this approach at some length in *Oakwood Park Lodge*, [1980] OLRB Rep. Oct. 1501, where a union had applied to be certified to represent certain employees who had previously been excluded from another bargaining unit by the Board on the basis that they exercised managerial functions. While the Board decided that it would not apply a doctrine analogous to *res judicata* in that case

because the parties were different, it did have this to say about the importance of finality in the Board's decisions:

Although the Act does not expressly authorize the application of the doctrine of *res judicata*, there are strong practical and policy grounds for doing so. Rights and duties have meaning only if they are certain and relatively stable. Parties expect that a decision of the Board will clarify their legal relationship and put an end to the controversy between them. Board decisions would lose much of their value if they did not provide a reliable guide for the conduct or planning of the parties' affairs. Continuous litigation would undermine the harmonious relationship between the parties which the Act is designed to foster, and could give rise to abuse and harassment of a weaker party. It could also give rise to costly duplication, inefficient utilization of the Board's scarce resources, and a serious impediment to the effective administration of the Act. This potential consequence is especially serious in labour relations matters where "time is of the essence" and finality is an important statutory objective. Moreover, from an institutional point of view, the prospect of relitigation greatly increases the possibility of inconsistent decisions which can only undermine the credibility of the adjudication system and the adjudicators. The doctrine of *res judicata* serves to minimize these possibilities, and is based upon the entirely reasonable expectation that if a judgement is rendered in an earlier case which is related logically to a subsequent proceeding, the former will be taken into account in resolving the latter.

15. Similarly, in *Park Lane Nursing Home, supra*, a union had applied to represent an "all employee" bargaining unit and agreed to exclude nurses on the basis that they exercised managerial functions. Several months later, the union applied for certification for a bargaining unit of nurses. The Board decided that since the applicant had agreed a few short months previously that nurses were managerial, and it was not contented that their duties had changed in the interim, it was not open to the union to now claim that the nurses were not managerial. Since there were thus no employees in the bargaining unit applied for, the application as a whole was dismissed, apparently on the basis of an estoppel-like rationale.

16. On the other hand, the Board has recognized that while parties rely on its decisions in structuring their relationship, changes in circumstances or in the law itself may require it to take another look at a previously-litigated or agreed-upon proposition. In *Globe and Mail Limited*, [1976] OLRB Rep. Nov. 662, the union had also applied to represent employees previously excluded from another of its bargaining units on the basis they performed managerial functions. In deciding the issue on its merits, the Board commented:

Before leaving this phase of the case, the Board is indeed quite concerned that we ought to preserve the stability of the collective bargaining relationship established by the parties through the years as a result of a Board certificate. Nonetheless, it does not follow that any Board decision made in the past is "carved in stone" and is thereby rendered immune from review. Should the merits of this case with respect to issues raised herein fall in favour of the applicant trade union, the respondent employer may simply be required (subject to its rights of review) to make whatever adjustments are necessary to accommodate our pronouncements. In other words, the decisions of this Board as they are amended or varied from time to time must take precedence over the parochial concerns of a constituent party notwithstanding the inconvenience that may result.

17. An appropriate balance between these two themes has been formalized in the case of applications under section 106(2) in a series of threshold tests. The most recent of those tests was set out by the Board in *The Windsor Star*, [1988] OLRB Rep. April 427 in the following terms:

14. Therefore, the Board will no longer restrict the evidence to be adduced before a Board Officer with respect to the duties and responsibilities of the person(s) in dispute to "changes" in those duties and responsibilities, as in the past. Section 106(2) applications commonly are initiated through an often sparse letter to the Board merely naming the individual(s) in dispute. Henceforth, the applicant must, in addition, indicate the basis for the application, i.e., the nature of the position, including duties and responsibilities (to the extent known, where the applicant is a trade union), the historical dimension to the position (if any) including any Board

determinations and parties' agreements and how the mischief against which sections 1(3)(b) or 12 are directed has arisen or has ceased. The respondent must outline fully any grounds it asserts as to why the Board should not entertain evidence as to the duties and responsibilities of the person(s) in dispute. The Board must be satisfied a "question" has arisen as to the "employee" or "guard" status of the individual(s) in dispute before a duties and responsibilities examination will be directed. Where the individual's status has not been previously determined by the Board in a certification or earlier 106(2) application or by specific agreement of the parties, an examination will generally be directed. Where the Board has previously determined the status of a person in a certification application or prior section 106(2) application or where the parties have reached a specific agreement as to the person's status, the Board will not permit evidence as to the person's duties and responsibilities to be adduced before a Board Officer unless the Board is satisfied, on the face of the application, that it appears the mischief against which section 1(3)(b) or section 12 is directed has arisen or has ceased. Where the Board is not so satisfied, the application may be dismissed without a hearing. In the Board's opinion, this policy does not undermine agreements of the parties as to a person's status and avoids repeated or frivolous examinations, yet provide sufficient flexibility to adequately respond to circumstances where the mischief against which sections 1(3)(b) and 12 are directed has arisen or has ceased.

18. In essence, the respondent now asks us to dismiss his application with respect to the operations supervisors, both as a result of the approach reflected in *Park Lane Nursing Home*, *supra*, and as a result of extending the *Windsor Star* test to this certification application.

19. Turning to the respondent's first argument, we have a number of reservations about applying either a *res judicata* or an estoppel approach to the facts before us. It is true that the 1979 decision was the result of a dispute litigated between the same parties. However, the decision is ten years old and describes the reasons for excluding transit inspectors, not operations supervisors, from a different bargaining unit. While a finding on employee status is not necessarily predicated on any particular bargaining unit, it is also fair to say that this kind of determination is more of an art than a science, involving a review of numerous factors and occupational functions in differing combinations and with varying weights and significance. The composition of the bargaining unit may be of some relevance in a borderline case, where the presence or absence of other employees in the unit subject to the supervision of the disputed individual brings the conflict of interest which lies at the core of the section 1(3)(b) exclusion into sharper or softer focus.

20. In this case, the age of the previous decision together with the change in classification titles also provides a credible context for assertions that circumstances have changed to the point where a review is now warranted. In addition, the elapse of time tends to rebut the suspicion that the Board's processes are being abused. We are not persuaded that the applicant organized employees and brought this application for the purpose of circumventing the *Windsor Star* section 106(2) test, as contended by the respondent.

21. The fact that the applicant did not raise the status of these individuals in negotiations is of some concern to us, but it does not have quite the same implications that an express agreement might have in similar circumstances. Indeed, given the applicant's view that the operations supervisors belong in a tag-end bargaining unit, their exclusion from the drivers' and maintenance unit in the collective agreement is somewhat ambiguous. In other words, the applicant's conduct does not suggest to us the kind of unfairness which often gives rise to estoppel arguments. In these circumstances, we are not persuaded that we should utilize a *res judicata* or estoppel approach to prevent a determination of this dispute on its merits.

22. Similarly, we do not see any necessity to extend the *Windsor Star* test rationale to this application. We agree that many of the concerns addressed in that case may arise in these circumstances as well. However, in our view they can generally be adequately dealt with either under the

less formal application of the Board's *res judicata* or estoppel line of jurisprudence, or by the Board's powers under section 102(13) of the *Labour Relations Act* and section 71 of the Board's Rules of Procedure. Under section 102(13), the Board may direct parties to file a variety of information and material (see for example, *Caterpillar of Canada Ltd.*, [1987] OLRB Rep. Feb. 192 and *Green Gables Manor Incorporated*, Board File No. 2030-85-R unreported, January 28, 1986). The Board may then find it is in a position to issue a decision on the basis of the material filed, or the Board may dismiss a claim under section 71 if the material filed under section 102(13) does not disclose a *prima facie* case for the remedy requested. In other words, much the same result as outlined in *Windsor Star* can be achieved by different means, and in an *ad hoc* manner that is more appropriate for certification applications.

23. That said, we have given some thought as to whether we should require the kind of information set out in *Windsor Star* in the exercise of our powers under section 102(13) in this case. On balance, we have come to the conclusion that it is not warranted here. In addition to those factors described earlier which led us to reject the application of a *res judicata* or estoppel approach, it also appears that there is only one classification for which this argument was made. We do not anticipate lengthy or complex examinations with respect to that position and in the particular circumstances of this case, it appears to us that it would be more expeditious to proceed to an examination on the merits of the dispute, rather than imposing preliminary filing requirements which might form the basis of a pre-emptive decision. We note, incidentally, that our conclusion is not inconsistent with the *Windsor Star* rationale (see *Fleetwood Ambulance Services*, [1988] OLRB Rep. Sept. 886).

24. It is worth emphasizing, however, that the history of the operations supervisor positions may still have a significant impact on the merits of the case. While the primary onus is on a party seeking to characterize an individual as beyond the protection and benefit of the *Labour Relations Act*, the Board has previously pointed out under section 106(2) that in practical terms there is an inevitable evidentiary onus on a party who wishes to persuade the Board that a long-standing arrangement or a prior decision should not speak with great authority (*City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121). We find this proposition equally applicable to the case before us, and it is not affected by our decision not to impose certain threshold requirements.

25. As a result, we appoint a Board officer to inquire into and report back to the panel on the duties and responsibilities of the operations supervisors.

26. Whether or not any of the disputed employees were included in the bargaining unit, the Board was satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on November 14, 1989, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. As a result, we were satisfied that these disputes could not affect the applicant's right to certification. In these circumstances, the Board would normally issue an interim certificate to the applicant. However, the respondent took the position that since over half of the bargaining unit was in dispute due to the disagreements described above, an interim certificate should not issue because collective bargaining would be an artificial exercise in these circumstances. Counsel for the respondent described a number of ways in which he anticipated that bargaining would be hindered by the outstanding disputes. The applicant argued that an interim certificate should issue in the usual manner because there were a number of areas which could be usefully dealt with by the parties in bargaining, and counsel provided a number of examples in this regard.

27. Section 6(2) of the *Labour Relations Act* provides as follows:

Where, upon an application for certification, the Board is satisfied that any dispute as to the composition of the bargaining unit cannot affect the trade union's right to certification, the Board may certify the trade union as the bargaining agent pending the final resolution of the composition of the bargaining unit.

28. As the Board noted in *City of Mississauga Public Library Board*, [1976] OLRB Rep. Feb. 1, this section was established to reduce or eliminate the mischief which may be caused by the delay attendant on a bargaining unit dispute during the critical post-certification period of high expectations and uncertainty:

This section of the Act allows the Board to certify a trade union pending a resolution of a bargaining unit dispute in those situations where the ultimate determination by the Board cannot affect the right of the union to certification. Prior to its enactment a union which had established the required membership support could not commence to negotiate a first agreement and was required during this critical period of high expectations and uncertainty to await the final bargaining unit determinations. The amendment is designed to neutralize whatever prejudice may be suffered by a trade union and its constituents in these circumstances by confirming its right to certification and by permitting it to serve notice and to commence to bargain pending the resolution of bargaining unit disputes.

29. In this case, the status of a little over one-half of the employees was in dispute. Although this is a substantial number, the Board commented in *City of Mississauga, supra*, that the prime consideration in the exercise of the Board's discretion under section 6(2) is whether meaningful bargaining can take place, rather than any particular formula based solely on the size of the dispute. In this regard, the Board said:

The exercise of the Board's discretion must be on a *case to case* basis whereby the prime consideration is whether or not meaningful bargaining, on even a restricted number of items, can take place. If meaningful bargaining cannot take place, for reasons related to a genuine bargaining unit dispute, then the Board in the exercise of its discretion must consider the negative effect of placing the parties in a collective bargaining interface at that point in time.

[emphasis in original]

30. In *University of Ottawa*, [1975] OLRB Rep. Sept. 694 the Board described its approach in a slightly different way, focusing on whether the problems caused by the dispute were insuperable barriers to the commencement of bargaining:

9. It may well be that problems of the sort suggested by the respondent will to some indeterminate extent restrict or inhibit bargaining. However, none of the problems to which the respondent has alluded are, in our view, insuperable barriers to the commencement of bargaining and it cannot therefore be said that no useful purpose is to be served by granting interim certification. Accordingly, we are prepared to grant the applicant's request, pursuant to the provision of section 6(1a) [now section 6(2)] of the Act.

31. The essence of the respondent's argument was that its bargaining strategy would be affected by not knowing the exact composition of the bargaining unit. We did not doubt that this was so, and that the applicant would be labouring under a somewhat similar disadvantage. Indeed, we accepted that it might well be difficult for the parties to *conclude* a complete collective agreement while this dispute was outstanding. However, as the Board noted in *University of Ottawa, supra*, the question is whether those problems present insuperable barriers to the *commencement* of bargaining. In this case, it appeared to us that the parties could productively address in negotiations at least some aspects of many typical contract provisions, for example, those relating to management rights, union dues, grievance and arbitration, seniority, job competitions, lay-offs, sched-

uling, hours of work, overtime, premium pay, holidays and vacations. Even some portions of the wages and benefit provisions could be resolved at this point. As a result, the fact that the parties might have some difficulty in maximizing their bargaining strategy did not in itself suggest to us that meaningful bargaining could not take place, or to use the words of the Board in *University of Ottawa, supra*, that “no useful purpose [was] to be served by granting interim certification”.

32. We acknowledged, as the Board pointed out in *Caterpillar of Canada Limited*, [1987] OLRB Rep. Jan. 27, that the parties may have to employ more flexibility and creativity in the actual process of bargaining than they might have otherwise had to do. However, on balance, it was our view that the problems raised by the respondent were not insuperable barriers to the commencement of bargaining, and that some meaningful negotiations could take place. We also noted that with the parties’ co-operation, the inquiries directed by the Board could be accomplished and the disputes between them resolved in an expeditious manner, which would have the effect of shortening the period during which collective bargaining would be hampered by these disputes.

33. Accordingly, we issued an interim certificate in the terms described in paragraph 6 above. A formal certificate must await the final determination of the bargaining unit.

34. Since that time, we have been advised that the parties met with respect to the disputes outlined in paragraphs 7 to 10 above, and were able to settle their differences in this regard. As a result, the only outstanding issues are the status of the operations supervisors, and the final composition of the bargaining unit.

35. This panel of the Board remains seized of this application.

DECISION OF BOARD MEMBER ROSS PIRRIE; January 25, 1990

1. I dissent with respect to the decision of the majority reached in paragraph 25.

2. I would dismiss the application for certification with respect to the operations supervisors. This would leave it open to the union to file a section 106(2) application requesting reconsideration of the 1979 Board decision that the positions in question be excluded from the existing operations and maintenance bargaining unit. Additionally, I would require in such a 106(2) application that the union provide the Board with some justification other than the passage of 10 years and a change in the title to warrant the Board entertaining such a reconsideration request.

3. Aside from my concern that a Board Officer appointment is premature, I am also concerned that the course the majority is pursuing could conceivably lead to the Board being the author of a bad labour relations situation. Were ultimately the Board to find that the operations supervisors should not be excluded from the provision of the Act, we would be obliged to include them in the bargaining unit presently being applied for. This in my view would be inappropriate.

4. By taking the course proposed in paragraph 2 above, the union would not be denied its day in court, the same conclusion with respect to whether the operations supervisors are to be included in or excluded from the provisions of the Act will be reached, and I am persuaded the Board will avoid the trap of producing what at best could be a difficult labour relations scene.

1887-89-R Amalgamated Transit Union Local 1587, Applicant v. The Corporation of the Town of Vaughan, and Tokmakjian Limited, Respondents v. Group of Employees, Objectors

Certification - Trade Union Status - Applicant citing recognition as employee organization by Ontario Public Service Labour Relations Tribunal - Trade union status question of fact in each case - Board having regard for applicant's history as bargaining agent for Crown employees - Applicant fitting statutory definition

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

DECISION OF THE BOARD; January 29, 1990

1. This is the continuation of an application for certification. In the Board's decision of December 4, 1989 directing a representation vote, it noted its oral ruling that the applicant was a trade union and said that its reasons for that portion of the decision would issue at a later date. We now provide those reasons.
2. The applicant called evidence in support of its claim to be a trade union. Simon Alexander Clarke, an employee of GO-Transit (also known as the Toronto Area Transit Operating Authority) for the last eight years and Executive Vice-President of Local 1587 ("the Local") for the last five years, gave evidence identifying the constitution and general laws of the Amalgamated Transit Union ("A.T.U."), the international union of which the applicant is a local, as well as the collective agreement with GO-Transit to which this local is a party. Mr. Clarke was elected under the authority of the constitution pursuant to which elections take place every three years.
3. As Executive Vice-President, Mr. Clarke's duties include acting as Grievance Officer, member of the Negotiating Committee, and member of the union management committee. He is involved in representing grievors before the Ontario Crown Employees Grievance Settlement Board and has represented Local 1587 in that capacity. Mr. Clarke was unable to testify as to the initial formation of the local but knew that the members had come from a T.T.C. bargaining unit.
4. The local, of whom there are approximately seven hundred members is a sufficiently established organization to have a full-time President and Business Agent, a Secretary Treasurer who will be full-time in July, 1990 and a Vice-President who holds a part-time position. It obtained bargaining rights for GO-Transit employees in 1981 and has remained in existence since that time, continuing to represent that bargaining unit for GO-Transit employees.
5. Counsel for the applicant cited *Ontario Hydro*, [1989] OLRB Rep. Feb. 185 at paragraph 44 for the proposition that it was less critical to focus on the original formation of an organization claiming to be a trade union where it has been in existence for a considerable period of time.
6. The applicant also relies on a decision of the Ontario Public Service Labour Relations Tribunal dated March 9, 1981 granting it status as an employee organization in a successful application for certification for a bargaining unit for employees of the Crown in Right of Ontario (Toronto Area Transit Operating Authority). The relevant definition in the Crown Employees Collective Bargaining Act, under which that finding was made, is as follows:

Section 1(1)

- (g) "employee organization" means an organization of employees formed for the purpose

of regulating relations between the employer and employees under this Act, but does not include such an organization of employees that,

- (i) receives from any of its members who are employees any money for activities carried on by or on behalf of any political party,
- (ii) handles or pays in its own name on behalf of members who are employees any money for activities carried on by or on behalf of any political party,
- (iii) requires as a condition of membership therein the payment by any of its members who are employees of any money for activities carried on by or on behalf of any political party,
- (iv) supports or requires its members who are employees otherwise to support any political party, or
- (v) discriminates against any employee because of age, sex, race, national origin, colour or religion;

7. The corresponding definition in the *Labour Relations Act*, section 1(1)(p) is as follows:

“trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

8. Employer counsel argued that the applicant should not be allowed to extend the principles in *Ontario Hydro, supra*, to this extent. He argued that the applicant had not proven status.

9. The Board is persuaded that the applicant is a trade union under the Act. This is a question of fact in each case that arises. We agree with *Ontario Hydro, supra*, that the Board cannot impose requirements beyond the reasonable meaning of the provisions of the Act in making such a finding. We are of the view that the applicant fits within a reasonable reading of section 1(1)(p). This local has become a bargaining agent for Crown employees under a statutory definition similar to the one in section 1(1)(p) of our Act. In that capacity it has negotiated collective agreements, represented individuals before the Crown Employees Grievance Settlement Board and has continued to maintain its status under the Constitution and By-laws filed. The Board notes the decision of this Board in File 1868-89-R in which Local 616 of the same union was recently granted status as a trade union.

10. As a chartered local of the A.T.U., it is an organization formed for purposes that include the regulation of relations between employees and employers. The objects set out in the A.T.U. constitution demonstrate this. For example, section 3 provides, in part, as follows:

The objects of this International Union shall be to organize Local Unions.

To place our occupation upon a higher plane of intelligence, efficiency and skill; ... to encourage the settlement of all disputes between employees and employers by arbitration; to secure employment and adequate pay for our work, including vacations with pay and old age pensions; to reduce the hours of labor and by all legal and proper means to elevate our moral, intellectual and social conditions.

...

To seek the improvement of social and economic conditions in the United States and Canada and to promote the interests of labor everywhere.

That we hold it as a sacred principle, that trade union *members* above all others should set a

good example as good and faithful *workers*, performing their duties to their employers with honor to themselves and to their organization.

[emphasis in the original]

and section 13 provides as follows:

SEC. 13 LOCAL UNIONS: 13.1 How Formed. A.L.U. [Local Union] may be formed by ten (10) or more employees who are eligible for membership in the A.T.U. and who must apply to the I.P. [International President] and send \$25.00 for a charter fee, outfit and seal, which will be forwarded, providing the applicants are qualified according to this Constitution.

The L.U. bylaws shall provide for the handling of all grievances and complaints of the membership and for the taking up of disputes arising between the membership and the company.

Article 4 of the Local By-Laws provides that the ATU Constitution shall govern in case of any conflict with the By-Laws. The evidence of Mr. Clarke of his functions under the Local Constitution and By-Laws persuades us that the applicant is currently functioning as a trade union and has been for several years.

11. We turn now to the outcome of the representation vote. No statement of desire to make representations has been filed with the Board within the time fixed under subsection 1 of section 70 of the Board's Rules of Procedure following the taking of the representation vote pursuant to the Board's direction of December 4, 1989, in this matter.

12. On the taking of the representation vote directed by the Board not more than fifty per cent of the ballots cast were cast in favour of the applicant.

13. The application is therefore dismissed.

14. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the bargaining unit within the period of six months from the date hereof.

15. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

3084-88-OH William James Kerr, Complainant v. W.C. Wood Co. Ltd., Respondent

Health and Safety - Evidence - Complainant alleging dismissal for compliance with Occupational Health and Safety Act - Complainant striking co-worker's hand with hammer - Employer treating as "culminating incident" - Board not prepared to assess merits of discipline in previous incidents - Complainant free to lead evidence that previous discipline grieved - No evidence complainant's involvement with safety matters played any part in employers' decision to dismiss - Complaint dismissed

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *M. Rozenberg* and *E. G. Theobald*.

APPEARANCES: *Izaak De Rijcke* for the complainant; *Robert J. Atkinson*, *Patty Murray* and *Paul Morris* for the respondent.

DECISION OF THE BOARD; January 19, 1990

1. This complaint was filed pursuant to section 24 of the *Occupational Health and Safety Act* (hereinafter referred to as the O.H.S.A. or the Act). The substance of Mr. Kerr's complaint is that he was discharged because he acted in compliance with the Act or the regulations or an order made thereunder and sought the enforcement of the Act or the regulations.

2. The respondent employer (Wood) submits that Mr. Kerr was terminated for good and sufficient reasons which were unrelated to the fact that Mr. Kerr raised concerns about any safety issues. More particularly, Wood asserts that Mr. Kerr was not terminated because of any "anti-safety animus" on the part of the company. It is submitted that Mr. Kerr was discharged because he deliberately and intentionally, or in the alternative recklessly swung a hammer at a fellow employee ultimately hitting that employee's hand thereby causing a significant injury.

3. Mr. Kerr asserts that this incident was an accident and that Wood merely seized upon this opportunity to terminate his employment because, in the mind of the employer, Mr. Kerr had become a "pain" because, *inter alia*, he had sought the enforcement of the Act, had cooperated with the Ministry of Labour during its investigation of an industrial accident three weeks prior to his discharge, and because he had recently been elected to the Health and Safety Committee.

4. Before we examine the facts we find it appropriate to briefly review the applicable law within which we propose to assess the evidence before us.

5. Section 24 of the O.H.S.A. reads as follows:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply, with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

(8) Notwithstanding subsection (2), a person who is subject to a rule or code of discipline under the *Police Act* shall have his complaint in relation to an alleged contravention of subsection (1) dealt with under that Act.

6. As was noted by the Board in *Commonwealth Construction Company*, [1987] OLRB Rep. July 961 at paragraph. 21:

... It is important to understand that what is protected by the Act is the right of employees not to be threatened or disciplined *because* of their acting in compliance with the Act (or regulations etc.) or seeking its enforcement. An employee might engage in conduct warranting discipline, and in those circumstances an employer can impose discipline, provided the discipline is not motivated even in part by a concern that the employee was acting in compliance with or seeking to enforce the Act. Discipline levied for that reason is proscribed by section 24(1). Whether a breach is found will depend on whether the Board concludes that the disciplinary response was even partially prompted because the employee was seeking to exercise his or her rights under the Act. In this respect, the Board's inquiry under section 24 of the this [sic] Act parallels the nature of the inquiry under section 89 of the *Labour Relations Act*.

7. As was stated by the Board in *Ministry of Community and Social Services*, [1988] OLRB Rep. Jan. 50 at paragraph 19:

...

Conduct which seeks enforcement of the Act is protected activity in order to encourage workers to raise health and safety concerns with their employer and others and to thereby reduce the likelihood of injury in the workplace.

8. In assessing whether an employee's discharge was a violation of the O.H.S.A., we must look to *all* the circumstances surrounding the discharge. Leaving aside for the moment consideration of section 24(7) of the O.H.S.A., (the proper interpretation and application of that section

was vigorously argued by both counsel), an examination of all the circumstances is not to determine whether there is just cause for the discharge, or whether the discharge was "fair" or "unfair" in some objective sense. Rather, our task is to determine whether the discharge was motivated in whole or in part by Mr. Kerr's safety related activities, or by Mr. Kerr's exercise of rights conferred upon him by the O.H.S.A. In so doing we must look to all of the circumstances.

9. In appropriate cases, an employer's conduct which is arbitrary, patently unfair or unreasonable, unduly harsh, precipitous or a response which is extraordinary given the employer's previous practice may lead to an inference of "anti-safety animus". In contested section 24(1) complaints, one would not normally expect an employer to openly and candidly admit it acted in contravention of the O.H.S.A. In *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299 at paragraph 5 (a complaint involving section 89 of the *Labour Relations Act*) the Board put this matter as follows:

5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other "peculiarities". (See *National Automatic Vending Co. Ltd.* case 63 CLLC 16,278)....

For this reason, the Board carefully scrutinizes the employer's conduct and surrounding circumstances to determine if the "true" or "real" motives (or one of the motives) of the employer was "tainted" by the employer's "anti-safety animus", or more correctly the employer's animus towards the employee because the employee sought enforcement or compliance with the Act.

10. The analysis the Board uses in making that determination parallels the analysis that it uses when dealing with complaints made pursuant to section 89 of the *Labour Relations Act*. Like section 89 of the *Labour Relations Act*, section 24 also contains a reverse legal onus provision. As was noted in *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745:

... the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct.

This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the act has occurred.

11. The same sorts of considerations and analysis apply in determining whether section 24(1) of the Act has been violated. In first determining whether an employer has acted in contravention of section 24(1) of the Act (and again leaving aside for the moment any consideration of section 24(7) of the Act) we cannot be "unduly swayed by either the coexistence of fair treatment or by the coexistence of legitimate reasons for the employer's conduct" (*Pop Shoppe (Toronto) Limited*, *supra*, at page 301). If the employer has satisfied us that no part of the reason for the discharge was because Mr. Kerr acted in compliance with the Act or the regulations or because he sought the enforcement of the Act or the regulations, the respondent would not have violated section 24(1) of the Act. It is only after making that determination that we can turn to address the effect, if any, of section 24(7) of the Act.

12. During the six days of hearing in this matter we hear the testimony of nine witnesses. As is not unusual in cases of this nature, the evidence of the witnesses called on behalf of Wood conflicted with the evidence of Mr. Kerr. The credibility of witnesses was an important issue to be resolved. We do not propose to recite the evidence of each of the witnesses and thereby point out various inconsistencies within their evidence or the contradictions with the evidence of any other witnesses. We propose merely to set out what we have found to be the relevant facts of the story as it unfolded before us.

13. Wood manufacturers freezers, refrigerators and other appliances at its two locations in the City of Guelph. It employs approximately eight hundred employees. The employees are represented by a labour committee of elected employee representatives who annually negotiate with management in respect of the terms and conditions of employment at Wood. That labour committee has not been certified as bargaining agent by the Board. The Board has not found it to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. Nevertheless, the committee has for the past twenty years or more negotiated with management. The results of those negotiations can be found in an hourly employee's guide book which contains, *inter alia* a provision in respect of the resolution of complaints through neutral third party arbitration.

14. Mr. Kerr first commenced employment with Wood in August 1978. Originally hired as a labourer, at the time of his discharge, he was a "cut to length" machine operator. Although Wood had certain concerns about what it sought to characterize during the course of the hearing as Mr. Kerr's quick temper or violent or aggressive attitude, the company did not have any concerns about Mr. Kerr's competence and ability to perform his work. In this regard, it is clear that Mr. Kerr was an efficient, industrious and "good" worker who did his job well.

15. Although Mr. Kerr was fired on February 10, 1989, the sequence of events which led up to that discharge started well before then. The respondent characterized the ultimate event which caused Mr. Kerr's discharge as a "culminating incident". It was asserted that this incident alone was sufficient to warrant discharge, but that in the alternative this culminating incident, in light of Mr. Kerr's past and extensive record certainly warranted discharge. It is therefore necessary to briefly set out Mr. Kerr's disciplinary record.

16. In April 1985, Mr. Kerr received a written warning in which he was advised "... this company will not tolerate the abuse of its supervisor's and use of abusive language towards them. If this happens again you will be severely disciplined." In July 1987, Mr. Kerr was suspended for two days for fighting with another employee. At that time Mr. Kerr was advised "you must not strike another person here again. Should this happen again, your dismissal will result." In November 1988, Mr. Kerr was suspended for five days. The disciplinary record in that instance states as follows:

It is understood that you approached a tow motor driver from behind and hit him on the back of the head and then on the upper arm. When he attempted to fend you off with an extended foot you pulled him off the tow motor which was still running. You claim it was only "horseplay" and you were not angry.

Your actions were totally unacceptable regardless and in light of the potential safety hazard you created and because of your recent employment history of conducting yourself in an improper manner you are suspended from work for the entire week of November 21, 1988.

You have also been notified that any further misconduct within a 24 month period commencing to-day may result in your immediate discharge.

17. At that time, Mr. Kerr was verbally advised that the five-day suspension was his "last

chance". If there was any further "misconduct" of any type, his employment would be terminated. Mr. Morris testified Mr. Kerr was concerned about the length of time he would have to "live under those conditions" but ultimately agreed to the twenty-four month period. Management at Wood felt that the incident on February 9, 1989 fell within the purview of the "misconduct" referred to in this letter.

18. These disciplinary actions were not grieved by Mr. Kerr. During the course of the hearing, an issue arose as to whether we could, or should, "go behind" Mr. Kerr's disciplinary record and hear evidence in respect of the incidents which led to the imposition of this discipline. We orally ruled as follows:

We have considered the submissions of the parties. The employer in this instance seeks to rely upon the complainant's previous disciplinary records to support the discharge imposed. The complainant is not represented by a trade union, or more accurately, an organization of employees which has been found to be a trade union within the meaning of clause 1(1)(p) of the *Labour Relations Act* and which has been certified by the Labour Relations Board to represent the employees of the respondent. We have heard evidence however, that the terms and conditions of employment for the employees of the respondent are covered by a document entitled "The Hourly Employees Guidebook". That document is a written document which is negotiated annually between the respondent company and the group of employee representative known as "labour representatives" who are elected annually by their fellow employees. The committee of labour representatives negotiate with management of the respondent in respect of the terms or conditions of employment contained in the Hourly Employees Guidebook. That guidebook also contains a grievance and arbitration procedure provision similar to those found in "standard" collective agreements negotiated between employers and trade unions who have been found to be trade unions within the meaning of section 1(1)(p) of the Act. There is an explicit provision which grants employees the right to arbitration by a third party neutral. The evidence thus far discloses that the complainant did not grieve the discipline which has been imposed upon him in the past and upon which the company now seeks to rely. Under these circumstances, the Board is not prepared to hear the evidence regarding these previous incidents or to assess the merits of the discipline imposed in respect of those previous incidents. The record speaks for itself. In so ruling, however, we wish to make it clear that the complainant or counsel is not precluded from leading evidence or cross-examining as to whether the complainant did "lodge any grievance or complaint" short of arbitration as provided for in the Hourly Employees Guidebook.

19. On January 19, 1989, a serious accident occurred in the workplace. Notwithstanding his use of hand guards or "possum guards", an employee had his hands caught in a press and was severely injured. The Ministry of Labour came to investigate the accident on the same date, but were unable to find anything wrong with the press or the guards which could have caused the accident. After the Ministry of Labour officials had left the plant however, rumours began to surface at the plant that another employee had tampered with the machine shortly after the accident. The employer was concerned about any allegations of tampering especially in view of the fact that the Ministry investigators had been unable to ascertain the cause of the accident and because the company had similar equipment in other areas of the plant. As a result, the company determined to conduct its own investigation.

20. On January 20, 1989, Mr. Paul Morris, the Human Resources Manager at Wood, together with Mr. Tom Cousineau, the Vice-President and General Manager of the Chest Freezer Division, started to interview employees whom the company had ascertained might have some information about the accident and the events immediately preceding and following the accident. Present at each of these meetings was Mr. John Courtney, the President of the Labour Committee. At approximately 8:30 a.m., Mr. Kerr was interviewed. Mr. Kerr was the fourth or fifth employee interviewed that morning. The employees who had been interviewed prior to Mr. Kerr had all been cooperative and candid in telling the employer what they knew and what they had seen around the time of the accident. During the interview of the first employee, Mr. Courtney did raise

some concerns as to whether the company could legally conduct any investigation under the circumstances, but was satisfied when the company explained it had consulted legal counsel and had been advised that it could conduct such an investigation.

21. When Mr. Kerr was interviewed, the company explained what it was doing and why it was conducting its investigations. During the course of the meeting, either through specific words or by his conduct, Mr. Kerr conveyed the impression that he knew something about the accident, but that he was not prepared to speak to the company representatives about the matter until he had an opportunity to speak to a Ministry official. Mr. Kerr did not then or at any other time specify why he was not prepared to speak with the company officials about the matter or why he was reluctant to talk to the company until he had spoken to the Ministry. The meeting was short and Mr. Kerr left.

22. Upon being confronted with Mr. Kerr's uncooperative attitude, the company representatives contacted legal counsel. They were advised that the company had both the right and an obligation to investigate, and that the employee had an obligation to advise the company if the employee was aware of any safety concerns or any contravention to the Act (section 17 of the O.H.S.A.). As a result of this advice, the company again met with Mr. Kerr at approximately 11:30 a.m.

23. During the second meeting, the company again advised Mr. Kerr of the seriousness of the accident and the allegations of tampering which had surfaced. Mr. Kerr was also advised that the company viewed seriously his refusal to cooperate with the investigation. Mr. Morris told Mr. Kerr that if he did not cooperate by telling the company what he had indicated he knew, the company would "escalate the matter" and he, Mr. Kerr, should treat this as a verbal warning. Mr. Kerr was given a half hour to think it over, contact the Ministry and get back to the company with his position. According to Mr. Courtney, both he and Mr. Kerr thought that was fair and agreed to the one-half hour time limit.

24. In the intervening half hour, Mr. Kerr contacted the Ministry of Labour. He subsequently advised the company that an inspector was on his way to deal with the matter, but that he had been advised that the company did not have the right to require Mr. Kerr to answer any questions and was acting in contravention of section 24(1) of the Act. Mr. Morris responded by referring to the employees' responsibilities under section 17 of the Act. This stalemate continued until the inspector arrived. The inspector took a statement from Mr. Kerr, and provided a copy of that statement to the company. The information provided in the statement did not materially differ from the information provided by the employees who had been interviewed before Mr. Kerr or by the dozen or so other employees who were interviewed. In fact, during his cross-examination, Mr. Kerr admitted that he thought he had *some* information which might assist the company in its investigation but that "others had more information than me." After the inspector had taken Mr. Kerr's statement and given it to the company's officials, the parties met and Mr. Morris expressed his opinion that he did not understand why Mr. Kerr had not provided this information in the first place. Mr. Courtney testified that in view of the information which Mr. Kerr did in fact have, he also could not understand why Mr. Kerr did not, during the very first interview at 8:30 a.m., cooperate with the company in its investigation. The entire issue was resolved that day. No disciplinary action was taken against Mr. Kerr. The company was satisfied with the information which Mr. Kerr provided to the company through the Ministry of Labour inspector and Mr. Kerr was satisfied that he has been able to first speak with the inspector before he spoke to Mr. Morris.

25. The company did not at any time during this incident voice any concerns or objections to Mr. Kerr talking to the Ministry of Labour or an inspector. Mr. Kerr did not file any grievances

or complaints in respect of this incident, although he did provide the inspector with a "report of witness" in which he outlined the sequence of events that occurred on January 20, 1989. Hindsight has shown this matter to be the proverbial tempest in a tea pot.

26. Mr. Kerr alleges that the events of January 20, 1989 was one of the reasons why he was ultimately discharged. His cooperation with the Ministry of Labour with respect to its investigation, and his less than cooperative attitude towards the company's investigation "soured" Mr. Morris' disposition towards Mr. Kerr and caused Mr. Morris to seize upon the first available opportunity to discharge him. The respondent denies these allegations. On the basis of the evidence before us, we are satisfied that the events of January 20, played no part in the company's decision to discharge Mr. Kerr on February 10, 1989.

27. Mr. Kerr also alleges that his election on February 8th or 9th to the Health and Safety Committee motivated the employer in its decision to terminate his employment after the February 9th incident. The employer denies this. After the January 19th accident and, because the Health and Safety representative had recently resigned his position, the company determined to "revamp" the Joint Health and Safety Committee. The company decided to have a "full-blown election" throughout the plant to have the employees elect their representatives to the committee. There were some problems in the conduct of that election including employees' complaints that not all parts of the plant were properly represented on the committee. Those complaints caused the company to redefine the electoral zones and that in turn caused the zone in which Mr. Kerr's department fell to be enlarged. Mr. Kerr suggested that this enlargement was an attempt by the company to thwart his attempts to be nominated and elected to represent his zone. We disagree. The change in the zone was initiated by the complaints of the employees. It was at the suggestion of the President of the Labour Committee that the previously unrepresented areas of the plant were added to Mr. Kerr's zone. There was no malice towards Mr. Kerr and no "anti-safety" animus involved in these actions. Similarly, we find that the "irregularities" in the conduct of the vote, (irregularities which related to the actual balloting and the counting of the votes), were not attempts by the company to hinder Mr. Kerr's electioning to the committee. Employees did complain about the fact that there was no central location for the ballot box so as to ensure that every employee had the opportunity to vote, and about the fact that there was no employee representative present for the counting of the ballots. These concerns were addressed in the election held to fill the vacancy created by Mr. Kerr's discharge. There is simply no evidence to suggest however that any of these irregularities were designed to defeat Mr. Kerr's desire to be elected as a health and safety representative. In fact, logic dictates the opposite conclusion. Only company officials were present at the counting of the ballots. If management at Wood was seriously concerned about Mr. Kerr's election to the Health and Safety Committee, they could merely have announced fictitious results. They did not. Rather, even prior to the posting of the results, Mr. Morris congratulated Mr. Kerr upon his election. There is no evidence to suggest that Mr. Kerr complained to the company about any irregularities involving his election to the committee. Having regard to the evidence before us, we are satisfied that Mr. Kerr's election to the Health and Safety Committee played no part in the decision to terminate his employment.

28. In this complaint, Mr. Kerr alleges that on the morning of February 9th, he raised certain safety concerns about an overhead hoist in the plant and a safety fence around a bender machine with Mr. Doug Langelles, the safety coordinator at the plant, and certain other supervisory personnel in the area where these pieces of machinery were located. His complaint alleges, *inter alia* "not more than a couple of hours into the morning, there were two complaints which I acted on right away. I feel that the company did not like this. I am only safety rep. for two hours and already I am causing trouble." There was also some evidence of a petition regarding the air quality

in the plant. That petition, although dated February 7, 1989, was delivered to management officials at least a week after Mr. Kerr's termination on the 10th, and was not signed by Mr. Kerr.

29. The evidence simply does not support the allegation that Mr. Kerr's involvement with any of these safety matters played any part in the company's decision to terminate his employment after the February 9th incident. Even Mr. Kerr's own evidence indicates that as soon as he advised the appropriate supervisory personnel in the area about the hoist, a maintenance employee was dispatched within fifteen to twenty minutes to correct the problem. Similarly, upon advising the area foreman of the need for a safety fence around the bender machine, the foreman indicated that he would take it up with the area supervisor and get back to Mr. Kerr in a couple of hours. Those immediate responses are inconsistent with Kerr's assertion of the "company not terribly appreciating" his "concern for attempts to raise awareness on the part of fellow employees of the safety rules and regulations including the provisions of/and regulations pursuant to the Occupational Health and Safety Act" (to use the words of Mr. Kerr's counsel). Moreover, there is simply no evidence to suggest that those who were involved in the decision to terminate Mr. Kerr's employment after the February 9th incident were aware of these safety concerns or Mr. Kerr's "involvement" with these safety matters.

30. This then leads us to the incident on February 9, 1989. There is no dispute that on that day Mr. Kerr swung a hammer which struck the baby finger of Mr. Laarman, a fellow employee, and caused Mr. Laarman severe pain and serious injury, necessitated hospital treatment and time off work. The dispute is whether Mr. Kerr's actions on that day were willful and deliberate or alternatively reckless, negligent and irresponsible as alleged by Wood, or accidental as alleged by Mr. Kerr. Mr. Morris testified that if he had been convinced that that incident was a "pure accident" and "not deliberate in any way" he would not have treated it as "misconduct" on Mr. Kerr's part (within the meaning of the "last chance" given to Mr. Kerr after the five-day suspension in November 1988) and would not have dismissed Mr. Kerr.

31. On February 9, 1989, Mr. Kerr was occupied at his usual job as a cut to length operator. His job may be described as follows: after the machine has cut the steel, the cut pieces fall onto a wooden skid placed at the end of the machine. After a specific number of pieces have been cut and stacked on the skid, Mr. Kerr uses a tow motor to take the skid with its load off its track. He then delivers the loaded skid to the press shop. The work environment at Wood is relatively noisy and ear plugs are worn by employees. In certain areas of the plant such as the press shop area, ear plugs are compulsory. Mr. Kerr's machine although not located in the press shop area, is also very noisy. Mr. Kerr therefore generally also wears ear plugs.

32. As indicated, Mr. Kerr was a proficient, skilled and very fast worker. The employees at Wood are paid a base rate plus a "bonus" or "incentive" based upon the number of pieces produced. Thus, the more pieces cut by Mr. Kerr, the higher his rate of pay. As an attestation of his speed and efficiency at his job, Mr. Kerr indicated that he always made his bonus and was generally the highest paid employee performing this cut to length job.

33. The speed with which Mr. Kerr performed his job because of this incentive system was a critical part of Mr. Kerr's case. Mr. Kerr testified that because he worked fast so as to enable him to earn the maximum amount of his bonus, his movements were continuous and fluid and he could not stop the descent of his hammer until it was too late. According to Mr. Kerr, Mr. Laarman's hand suddenly appeared on the skid he was hammering. The speed at which he was hammering, combined with the fact that his head was down and concentrating on the hammering, prevented Mr. Kerr from seeing Mr. Laarman's hand on the skid until it was too late. The hammer was on its way down and, as he was unable to stop his motion, Mr. Kerr accidentally hit Mr. Laarman's hand

on the skid. In his complaint and in the subsequent letter written to Mr. John Wood, the President of the respondent employer, Mr. Kerr also indicated that when Mr. Laarman was hit, it was not a scheduled break and Mr. Laarman "should not have been in my area, or near my machine, much less leaning on my skid."

34. Mr. Laarman and the other witnesses called by the respondent presented a different version of the sequence of events that transpired on February 9, 1989. On balance we prefer their version of the events that day. According to the witnesses called by the respondent, at the time of the incident, Mr. George Parker had entered Mr. Kerr's work area to borrow the tow motor parked there. Mr. Kerr needed the tow motor to take off the load and told Mr. Parker to wait. Mr. Laarman came over to talk to Mr. Parker. When Mr. Kerr returned from having delivered his load, the three men talked briefly. Mr. Kerr then went back to his machine and proceeded to hammer the nails on the new skid he had dropped onto the table. Mr. Laarman went over to complain to Mr. Kerr about the noise he was making in hammering the nails. On other occasions, Mr. Laarman had complained to Mr. Kerr both about the amount of noise he made in dropping the skids and the noise he makes in hammering the nails in the skid. Mr. Laarman is of the view that Mr. Kerr should use the tow motor to position the skids rather than merely dropping the skids. This would be less noisy. Moreover, if Mr. Kerr used the tow motor, rather than merely dropping the skid in place, the nails in the skid would not "pop" and Mr. Kerr would not have to use the hammer to nail the "popped" nails back into the skid.

35. At the time Mr. Laarman complained about the noise Mr. Kerr was making, Mr. Kerr had already started to hammer the nails in the skid. Mr. Kerr was standing on one side of the skid and Mr. Laarman on the other. Mr. Kerr testified he did not hear Mr. Laarman. Mr. Laarman testified that he could not recall if Mr. Kerr said anything to him. The witnesses who testified before the Board and those employees who provided the witness statements to Mr. Morris shortly after the incident however indicated that they saw Mr. Kerr and Mr. Laarman speak to each other while the men were standing on opposite ends of the skid.

36. Mr. Laarman testified that Mr. Kerr continued to hammer while moving towards the middle of the skid. Mr. Laarman put his hand on the skid directly in front of him and told Mr. Kerr that there was no need to hammer in that area because it was all smooth and no nails had popped up. Mr. Laarman rubbed his hand over the skid to show Mr. Kerr how smooth it was. Mr. Kerr continued to hammer moving the hammer from the left end of the skid towards the middle and from the top to the bottom as he hammered nails. Mr. Laarman was standing near the top right end of the skid and his hand moved over the top right corner of the skid while he spoke to Mr. Kerr. Mr. Kerr continued to hammer nails and swung the hammer away from the middle end of the skid towards the top right corner of the skid where Mr. Laarman's hand was. At that point, the men were still on opposite sides of the skid although the distance between them had narrowed to approximately three or four feet. Mr. Kerr hit Mr. Laarman's hand breaking the bones in his baby finger and necessitating the removal of the nail on the baby finger and several stitches.

37. At the time he was struck, Mr. Laarman was wearing gloves. Upon being hit, Mr. Laarman cursed Mr. Kerr. Mr. Kerr said it was an accident. Mr. Laarman took off his gloves and saw the blood. Mr. Kerr grabbed some wipes, applied pressure to the finger and took Mr. Laarman to the first aid station.

38. Mr. Morris drove Mr. Laarman to the hospital. During the conversation on the way to the hospital, Mr. Laarman continued to curse Mr. Kerr and stated that he could not believe Mr. Kerr had hit him. Although Mr. Morris could not recall the exact words used, Mr. Morris testified

that during the drive Mr. Laarman indicated that he thought Mr. Kerr had acted in a deliberate manner.

39. After dropping Mr. Laarman off at the hospital, Mr. Morris returned to the plant. There he spoke to Mr. Kerr in the presence of Mr. Courtney. Mr. Morris related to Mr. Kerr what Mr. Laarman had said. Mr. Kerr indicated that the matter had been an accident. Mr. Morris referred to Mr. Kerr's previous record and said that this time Mr. Kerr may have gone too far. Mr. Kerr was suspended pending further investigation of the incident, was asked to remove his personal belongings from the plant and was escorted from the premises.

40. Thereafter Mr. Morris interviewed George Parker in the presence of John Courtney. Mr. Parker was unable to shed much light on what had happened because he had not seen anything. Mr. Parker had heard Mr. Laarman shout and curse at Mr. Kerr and had heard Mr. Kerr respond that it was an accident. Mr. Parker testified that at that time Mr. Laarman responded by indicating that he did not think it was an accident. Mr. Parker was also able to describe the site and where the two men were positioned when the hammer hit Mr. Laarman's finger.

41. Mr. Morris investigated further. Together with Mr. Parker and Mr. Courtney he went to the plant floor to examine the site where the incident had occurred. He examined the size of the skid, the table on which it had been placed while Mr. Kerr was hammering and its height from the floor. He spoke to other employees in the area to determine if they had observed anything.

42. Two employees spoke to Mr. Morris and recounted what they had seen. The first, Mr. Sajed Karim indicated he saw Mr. Laarman and Mr. Kerr on opposite sides of the skid talking to each other. Mr. Kerr was hammering close in his own corner. He then saw Mr. Kerr bring the hammer down with full force and with a "smile on his face". He saw Mr. Laarman jump and grab his finger. Mr. Karim thought the whole matter was a joke. He did not realize Mr. Laarman had been struck until later. That night, Mr. Morris wrote down a synopsis of what Mr. Karim had said. After making a minor alteration, Mr. Karim, again in the presence of Mr. Courtney, read and signed the synopsis the following day. Mr. Karim testified before the Board and corroborated both what he had seen and what he had told Mr. Morris.

43. Mr. Morris also spoke to Mr. Walter Crawford. Mr. Crawford did not testify before the Board. On February 10th and in the presence of Mr. Courtney he did however also sign the synopsis of what he had seen. Mr. Morris had prepared this synopsis after his discussion with Mr. Crawford on February 9th. Mr. Crawford also made certain changes to the synopsis prepared by Mr. Morris before signing the statement. In particular, Mr. Crawford added the following words.

Bill had said something back and keep [sic] hammering. I did not realize John had been hit until he went up the aisle.

44. At around 6:00 p.m. on February 9th, Mr. Morris again spoke to Mr. Laarman. It was arranged that Mr. Laarman would come to the plant the next day to discuss the incident. Mr. Laarman spoke to Mr. Morris the following morning at approximately 7:00 a.m. On that occasion, Mr. Laarman would not say whether he thought the incident was deliberate or not. He merely outlined the sequence of events indicating that the men had been standing on opposite sides of the skids, that Mr. Kerr had been hammering on one end of the skids, had moved towards the centre and ultimately struck a blow with "full force" at the top end of the skid where Mr. Laarman had placed his hand. Mr. Laarman also emphasized that the skid had been a new skid, and that because of its smoothness it had been unnecessary for Mr. Kerr to hammer in the area of Mr. Laarman's hand. Mr. Laarman also signed a written statement outlining this sequence of events. Mr. Laarman also spoke to Mr. Morris about the extent of his injury to his finger.

45. Having spoken to these various witnesses, Mr. Morris concluded that Mr. Kerr had acted in a "careless and irresponsible manner". Mr. Morris concluded that Mr. Kerr had been angered by Mr. Laarman's complaints about the noise and at the very least had tried to intimidate Mr. Laarman by striking the hammer close to Mr. Laarman's hand. Mr. Morris thought that Mr. Kerr might not have intended to hit Mr. Laarman's hand, but certainly intended to come close enough to scare him. Mr. Morris concluded that Mr. Kerr's actions had been "deliberate" insofar as he had consciously swung the hammer towards another employee. Mr. Morris concluded this action was deliberate because Mr. Kerr knew that Mr. Laarman was standing next to the skid, had been observed speaking with Mr. Laarman and, given the respective positions of the two men relative to the skid, obviously had to reach over towards the area where Mr. Laarman was standing before swinging the hammer in a downward motion.

46. In his testimony before us, Mr. Laarman also stated that he did view this incident as an accident. He stated that he had told some people, including Mr. Morris, that Mr. Kerr's conduct was intentional. Mr. Laarman's testimony that he told Mr. Morris that he felt Mr. Kerr's conduct was intentional is somewhat inconsistent with a statement which he made to Mr. Kerr when Mr. Kerr visited him at his home several weeks after this incident. Mr. Kerr had secretly tape recorded his conversation with Mr. Laarman on that occasion. That tape recording was proved and admitted into evidence. The conversation between Mr. Laarman and Mr. Kerr on that occasion indicates that Mr. Kerr advised Mr. Laarman about his difficulties in obtaining other employment stating that he felt that Wood was deliberately and maliciously telling prospective employers that he had intentionally hit another employee with the hammer. Thereafter, Mr. Kerr asked Mr. Laarman if he also thought Mr. Kerr had intentionally hit him. Mr. Laarman responded by stating that "I never said it was intentional but I wouldn't say it was an accident either. It happened so fast."

47. Having concluded that Mr. Kerr's actions were at least to some extent deliberate, Mr. Morris was of the view that Mr. Kerr's conduct was in and of itself sufficient to warrant discharge. Mr. Morris was particularly concerned about the safety at the plant and felt Mr. Kerr's unsafe conduct warranted discharge. When this incident was coupled with Mr. Kerr's previous disciplinary record, especially the November 1988 five day suspension and final disciplinary warning, Mr. Morris concluded that there was no alternative disciplinary response but discharge. He discussed the matter with Mr. Wood on the morning of February 10th. Mr. Wood and Mr. Morris together decided that Mr. Kerr's employment would be terminated. In arriving at that decision there was neither discussion of, nor consideration of, the safety matters referred to in paragraphs 19 to 29. Mr. Kerr was advised of his termination later that day.

48. We have examined and considered the evidence and submissions before us and are satisfied that no part of the reason for Mr. Kerr's discharge was concern over Mr. Kerr's actual or prospective attempts to seek enforcement of the O.H.S.A. or because Mr. Kerr was acting in compliance with the Act or the regulations. Wood's treatment of Mr. Kerr was not based either in whole or in part because Mr. Kerr was seeking to exercise rights under the Act. We have concluded the respondent did not violate section 24(1) in its discharge of Mr. Kerr.

49. We found Mr. Morris to be a credible witness and are satisfied that he did not consider any of the safety issues identified by Mr. Kerr in his complaint. Indeed, some of these matters were not even known to Mr. Morris at the time of Mr. Kerr's discharge. Mr. Morris considered and assessed the evidence available to him in respect of the February 9th incident after a thorough investigation of the matter. Given the statements made to him by both Mr. Laarman and the other employees interviewed, Mr. Morris' conclusion that Mr. Kerr had acted in a deliberate and not an accidental manner was not unreasonable. The sole reason for Mr. Kerr's discharge was Mr. Morris' assessment of the February 9th incident and Mr. Kerr's previous disciplinary record.

50. As indicated, we are of the view that in determining whether there was a violation of section 24(1) of the Act, (and absent any consideration of section 24(7) at this initial determination) it is not necessary for us to adjudicate upon the “fairness” of the discharge. Rather our role is to adjudicate upon the “legitimacy” of the discharge to ensure that the “real” reasons for the discharge were as put forth by the employer and were not tainted by illegitimate reasons contrary to the O.H.S.A. At this initial determination, we do not consider it appropriate to “second guess” the employer with regard to the appropriateness or severity of the disciplinary penalty. Having heard and assessed all of the evidence however, we wish to note that we have concluded that Mr. Morris’ assessment of the February 9th incident was reasonable and accurate.

51. We are of the view that on February 9th, Mr. Kerr knew Mr. Laarman was standing immediately next to the skid. Indeed, Mr. Kerr acknowledged that during his cross-examination. Mr. Kerr professed not to have heard Mr. Laarman speak to him while he was hammering because he was wearing ear plugs. We do not accept this explanation in view of the evidence of Mr. Kerr’s fellow employees who saw him speak to Mr. Laarman while he was hammering the nails into the skid prior to swinging the hammer for that last fatal blow, and in light of Mr. Kerr’s own evidence that immediately after hitting Mr. Laarman’s hand, he heard Mr. Laarman curse and ask why he had hit him. Mr. Kerr immediately responded “it was an accident”. Mr. Kerr was certainly able to hear Mr. Laarman then.

52. In light of all the evidence relating to the sequence of events, we find that Mr. Kerr knew Mr. Laarman was next to the skid and had his hand on the skid while talking to him. Mr. Kerr chose to ignore Mr. Laarman at that point in time. Instead he deliberately reached across the width of the skid, hammer in hand, and swung the hammer in the direction of Mr. Laarman’s hand resting on the skid. Given the position of the two men in relation of the skid and the manner in which Mr. Kerr demonstrated he hammered the nails, we have determined that, at the very least, to the extent of swinging the hammer in the direction of a fellow employee whom he knew to be there, Mr. Kerr’s actions were deliberate, careless and reckless.

53. We turn now to consider whether the penalty of discharge was appropriate in the circumstances and whether we ought to substitute such other penalty as we might consider “just and reasonable in all the circumstances”. Relying upon *Commonwealth Construction Company, supra*, counsel for the complainant argued that, in the absence of a specific penalty clause in the collective agreement, and pursuant to section 24(7) of the O.H.S.A., the Board has jurisdiction to substitute such penalty as it considers appropriate. At the commencement of the submissions, counsel for the complainant indicated that Mr. Kerr did not seek reinstatement, but was limiting his claim to compensatory damages. The parties agreed that the Board would remain seized in respect of that matter.

54. Counsel for the respondent submitted that the Board in *Commonwealth Construction Company* erred. He argued that if we were to determine that the respondent had not violated section 24(1) of the Act, it was not, as a matter of law, open to the Board to substitute another penalty for the discharge. Alternatively, it was submitted that if the Board did have the jurisdiction and discretion to substitute another penalty, it ought not to be exercised in these circumstances.

55. We have determined that it is unnecessary for us to address counsel’s arguments in respect of section 24(7). Assuming we have the jurisdiction to substitute another penalty, in the circumstances of this case we are not prepared to exercise such jurisdiction and grant a monetary award of damages to the complainant. The complaint is therefore dismissed.

1269-86-R; 1272-86-R; 1279-86-R; 1280-86-R; 1286-86-R; 1287-86-R; 1290-86-R; 1291-86-R; 1293-86-R; 1845-86-R (Court of Appeal No. 319/89) 504578 Ontario Limited, carrying on business as Murray Collard Fisheries, Jim Fraser Fisheries Ltd., H. Tiessen Fisheries Ltd., Favignana Fishing Co. Limited, A. Figliomeni & Sons Limited, Four Brothers Fishing Co., 538391 Ontario Limited operating as Peralta Foods, CP Fisheries Ltd., Family Fishery Company Ltd. (Applicants/Appellants) v. Great Lakes Fishermen and Allied Workers' Union and Ontario Labour Relations Board (Respondents)

Constitutional Law - Judicial Review - Employer appealing decision of Divisional Court upholding Board's jurisdiction to issue certification order in commercial fishing industry - Federal constitutional jurisdiction over fisheries restricted to protection and preservation of fisheries as public resource - Federal constitutional jurisdiction not extending to business of commercial fishing - Labour relations of commercial fishing falling within provincial jurisdiction over property and civil rights - Board having jurisdiction to issue certification order - Appeal dismissed

Board decision found at [1988] OLRB Rep. Jan. 23

Divisional Court decision November 23, 1988 (Unreported).

Court of Appeal Robins, Krever and Carthy JJ.A. January 16, 1990

Endorsement: We agree with the Divisional Court that the Board correctly concluded that it had jurisdiction to entertain the union's applications for certification. The decided cases have held that Parliament's authority under s.91(12) is restricted to legislation for the protection and preservation of fisheries as a public resource. We agree with the Board that s.91(12) does not extend to the regulation of the business of commercial fishing. The labour relations of the appellants and their employees are therefore a matter within provincial jurisdiction.

We do not agree with the appellants' basic contention that the decision of the Supreme Court of Canada in *La Commission de la Sante et de la Sécurité du Travail et al. v. Bell Canada*, [1988] 1 S.C.R. 748 impairs the validity of the decisions of the Board and the Divisional Court. In that case provincial legislation respecting health and safety in the workplace (and characterized as legislation respecting working conditions and labour relations) was held inapplicable to what is clearly a federal undertaking. The case does not deal with the fundamental question in this case, namely, whether the regulation of the business of fishing is included in the federal power conferred by s.91(12). As already indicated, it is our view that the business of fishing is not covered by s.91(12). It follows that the labour relations in issue here remains a matter of property and civil rights in the province and is governed by the Ontario *Labour Relations Act*.

The appeal will be dismissed with costs to the respondent union. There will be no costs to the Board or the Attorney General.

0595-86-R; 0596-86-U; 0828-86-R, 0829-86-U; 1399-86-R; 1400-86-U; 1898-86-R; 1899-86-U (Court File No. 954/89) The Ontario Legal Aid Plan (Applicant) v. Ontario Public Service Employees Union, Ontario Labour Relations Board, Neighbourhood Legal Services, Injured Workers' Consultants, Tenant Hotline Inc. and Community Legal Education Ontario (Respondents)

Judicial Review - Related Employer - Union seeking declaration that the Ontario Legal Aid Plan is a common employer with three community legal clinics - Clinics independent of OLAP but are funded by it and are accountable for the proper use of public funds - OLAP found to be engaged in related activities - Common control criteria met because OLAP influenced the management of the clinics - Board exercising discretion to make one employer declaration with respect to two clinics where OLAP had so involved itself in the affairs of the clinics that to ensure meaningful collective bargaining the union needed to be able to negotiate with OLAP - Employer seeking judicial review of decision on grounds Board ignored regulation for establishment and funding of clinics - Board finding of "intervention" in management and operation of clinics by personnel of applicant not unreasonable - Board not obliged to interpret and apply other legislation after threshold finding of "intervention" under related employer provision of *Labour Relations Act* - Board obliged to consider only labour relations aspects of clinics and not legal services aspect of their operations - Application dismissed

Board decision found at [1989] OLRB Rep. Aug. 862.

Divisional Court, Callaghan C.J.H.C., Reid and Steele JJ. January 19, 1990

Callaghan C.J.H.C.: (Orally) This is an application for judicial review in respect of the decision of the Ontario Labour Relations Board (the "Board"), dated August 29, 1989. The applicant seeks an order quashing the majority decision insofar as it granted declarations with respect to the bargaining unit employees of the respondents Neighbourhood Legal Services and Injured Workers' Consultants. The Board declared that such clinics and the applicant constituted a single employer for the purposes of the *Ontario Labour Relations Act*, R.S.O. 1980, c.224 (the "Act").

In this case the Board was conducting a hearing pursuant to an application under s.1(4) of that Act. The mischief to which that section is directed is the prevention, *inter alia*, of the erosion of bargaining rights. After a very lengthy hearing, extended written submissions and oral argument, the Board in its reasons stated:

In our view, this case turns on the issue of whether OLAP has so involved itself in the affairs of the respondent clinics that to ensure meaningful collective bargaining the union should be able to negotiate with OLAP as well as the clinics.

The Board concluded that in the case of the clinics in issue on this application a declaration of common employment was justified on the facts establishing intervention in the operation and management of the clinics by personnel of the applicant. This finding of "intervention" was clearly within the jurisdiction of the Ontario Labour Relations Board and arises out of a reasonable interpretation and application of s.1(4) of the Act.

The applicant submits in a very able argument that this conclusion ignores the effect of the terms of the regulation establishing and funding the respective clinics (Ontario Regulation 59/86 passed pursuant to the *Legal Aid Act*, R.S.O. 1980, c.234), and that the Board improperly declined jurisdiction in refusing to construe that regulation. In our view, the Board was under no obligation to

interpret and apply legislation other than s.1(4) of the Act in the circumstances of this cases, having regard to its threshold finding of “intervention”.

The Board was not called upon to determine whether the applicant’s own actions were consistent with its obligations under the clinic funding regulation; nor does the Board’s decision interfere with the independence of the clinics in rendering or delivering quality legal services to the client groups of those clinics. The Board’s mandate was to consider only the labour relations aspects of clinics and not the legal services aspects of their operations.

We accordingly can find no jurisdictional error that would permit us to intervene and therefore the application must be dismissed.

The application will be dismissed with costs to the respondent union. No other order as to costs.

CASE LISTINGS DECEMBER 1989

	PAGE
1. Applications for Certification	1
2. Applications for First Contract Arbitration	9
3. Applications for Declaration of Related Employer.....	9
4. Sale of a Business	10
5. Union Successor Rights	11
6. Applications for Declaration Terminating Bargaining Rights.....	11
7. Applications for Declaration of Unlawful Lockout.....	12
8. Complaints of Unfair Labour Practice	12
9. Jurisdictional Disputes.....	14
10. Applications for Determination of Employee Status.....	15
11. Complaints under the Occupational Health and Safety Act	15
12. Environmental Protection Act.....	15
13. Colleges Collective Bargaining Act.....	15
14. Construction Industry Grievances	15
15. Applications for Reconsideration of Board's Decision	18

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1989

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0172-89-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Supreme Carpentry Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0786-89-R: International Brotherhood of Painters & Allied Trades, Local 15990 (Applicant) v. 715329 Ontario Ltd. c.o.b. as Gallant Painting (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Sarnia, Moore Township and Sarnia Township, save and except foremen and persons above the rank of foreman, sales, office and clerical staff" (*Having regard to the agreement of the parties*) (50 employees in unit)

0864-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. High Reach Maintenance Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0865-89-R: Labourers' International Union of North America, Local 1256 (Applicant) v. High Reach Maintenance Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (25 employees in unit)

1094-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Western Inventory Services Ltd. (Respondent)

Unit: "all employees of the respondent at or out of Metropolitan Toronto, save and except Inventory Manager, persons above the rank of Inventory Manager, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (29 employees in unit)

1181-89-R: Independent Union of Precision Diecasters (I.U.P.D.) (Applicant) v. Fisher Gauge Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all office and clerical staff of the respondent employed in Peterborough, save and except supervisors, persons above the rank of supervisor, Personnel Secretary, Senior Clerk Typist, Marketing Secretary, Fisher Cast Secretary, Computer Operator, Secretary-Ashburnham Plant Operations, and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (*Having regard to the agreement of the parties*) (*Clarity Note*)

1482-89-R: Teamsters Local Union No. 879 (Applicant) v. Hamilton Modular Buildings Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Regional Municipality of Niagara, save and except foremen, those above the rank of foreman, office and sales staff, and students employed during the school vacation period” (53 employees in unit) (*Having regard to the agreement of the parties*)

1565-89-R: Canadian Union of Public Employees (Applicant) v. Provincial Nursing & Retirement Centre Inc. (Respondent)

Unit #1: “all employees of the respondent Cedarbrook Lodge in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff, social director, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (45 employees in unit) (*Clarity Note*)

Unit #2: (see *Applications for Certification Dismissed Without Vote*)

1616-89-R: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Applicant) v. International Consumer Brands Inc. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1617-89-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Dommic Const. Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (17 employees in unit)

1744-89-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America - UAW (Applicant) v. Cargill Grain Company Ltd. (Respondent)

Unit: “all office and clerical employees of the respondent in Chatham, save and except Graintraders, the Executive Secretary to the Regional Manager, The Comptroller, Managers and persons above the rank of Managers, students and persons not regularly employed for more than 24 hours per week” (27 employees in unit) (*Having regard to the agreement of the parties*)

1750-89-R: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Applicant) v. 737049 Ontario Ltd. c.o.b. D’Luxe Drywall 1987 (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

cial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1844-89-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Clover Catering Inc. (Respondent)

Unit #1: "all employees of the respondent at Lincoln Place Nursing Home, 429 Walmer Road in the Municipality of Metropolitan Toronto, save and except supervisors, and those above the rank of supervisor, office and accounting staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (14 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Applications for Certification Dismissed Without Vote*)

1873-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Amstore Canada (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1877-89-R: Service Employees' International Union, Local 204, AFL-CIO-CLC (Applicant) v. Community Lifecare Inc. (Respondent)

Unit: "all employees of the respondent at Birkdale Villa in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered, graduate and undergraduate nurses, professional medical staff, paramedical employees, office and clerical staff, supervisors and persons above the rank of supervisors" (8 employees in unit) (*Having regard to the agreement of the parties*)

1892-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 141 (Respondent)

Unit: "all employees of the respondent engaged in maintenance working at 95, 100, 125, 135, 140, 150, and 155 Leeward Glenway, Don Mills, Ontario including Resident Superintendents, save and except property manager, persons above the rank of property manager, office and sales staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

1898-89-R: Canadian Union of Public Employees (Applicant) v. Sisters of St. Joseph of the Diocese of Peterborough in Ontario (Respondent)

Unit: "all lay office and clerical employees of the respondent in Parry Sound, save and except administrative Assistant, Secretary to the Director of Nursing, Secretary to the Director of Personnel, Office Supervisor, department heads and persons above the rank of department heads" (8 employees in unit) (*Having regard to the agreement of the parties*)

1907-89-R: Service Employees Union, Local 183 (Applicant) v. Wingrill Inc. (Respondent)

Unit: "all employees of the respondent in Brighton, save and except office, clerical, sales, supervisors and persons above the rank of supervisor" (22 employees in unit) (*Having regard to the agreement of the parties*)

1917-89-R: Labourers' International Union of North America, Local 607 (Applicant) v. The Corporation of the Municipality of Paipoonge (Respondent)

Unit: "all employees of the respondent, save and except superintendent, those above the rank of superintendent, and office and clerical staff" (32 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1920-89-R: United Steelworkers of America (Applicant) v. Placer Dome Inc. (Respondent)

Unit: "all employees of the respondent at its Dona Lake Mine in the Township of Pickle Lake, save and except forepersons, persons above the rank of foreperson, office, clerical, technical and sales staff and students employed during the school vacation period" (70 employees in unit) (*Having regard to the agreement of the parties*)

1936-89-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Osgoode (Respondent)

Unit: "all employees of the respondent in the Township of Osgoode, save and except foreman, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*)

1939-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Cultural Woodtech Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

1962-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Robert Chabot Enterprises Ltd. c.o.b. Centennial Construction Equipment Rentals (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical, sales staff, dispatchers and employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (25 employees in unit) (*Having regard to the agreement of the parties*)

1973-89-R: Ontario Public Service Employees Union (Applicant) v. Green's Ambulance Service Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Simcoe, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and students employed during the school vacation period" (19 employees in unit) (*Having regard to the agreement of the parties*)

2001-89-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. E.D.S. Painting & Decorating Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2004-89-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Rubican Interiors Ltd. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)
(Clarity Note)

2009-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. 715530 Ontario Inc. c.o.b. Bradley Utility Contractors (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2039-89-R: Service Employees Union, Local 183 (Applicant) v. Centre for Educative Growth (Respondent)

Unit: “all employees of the respondent in the City of Gloucester and the City of Ottawa, save and except supervisors, persons above the rank of supervisor and the administrative officer”(12 employees in unit)
(Having regard to the agreement of the parties)

2051-89-R: United Brotherhood of Carpenters & Joiners of America, Local 38 (Applicant) v. Hapdale Management (Niagara) Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

2055-89-R: Labourers’ International Union of North America, Local 527 (Applicant) v. 156755 Canada Inc. c.o.b. as C.S. Construction Inc. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

2063-89-R: United Brotherhood of Carpenters & Joiners of America, Drywall Acoustics Lathing & Insulation, Local 675 (Applicant) v. La Vitesse Drywall & Taping (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and

the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2064-89-R: United Brotherhood of Carpenters & Joiners of America, Drywall Acoustics Lathing & Insulation, Local 675 (Applicant) v. B - 12 Drywall & Acoustics Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2110-89-R: Labourers' International Union of North America, Local 506 (Applicant) v. Umacs of Canada Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Vaughan, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (89 employees in unit) (*Having regard to the agreement of the parties*)

2113-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 128 (Respondent)

Unit: "all employees of the respondent engaged in cleaning and maintenance at 1, 3, 5, 7, 9, 11, 15, 17 & 19 Four Winds Drive in the Municipality of Metropolitan Toronto, save and except property manager, persons above the rank of property manager, office and clerical staff" (11 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1467-89-R: Service Employees' International Union, Local 532 Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Burlington Association for Community Living (Respondent)

Unit: "all employees of the respondent in the City of Burlington, save and except program managers, persons above the rank of program manager and office staff" (71 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	73
Number of persons who cast ballots	53
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	22

1666-89-R: Canadian Union of Public Employees (Applicant) v. Kent County Roman Catholic Separate School Board (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the County of Kent employed as teacher assistants or educational assistants, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of October 4, 1989" (38 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	38
Number of persons who cast ballots	31
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	14

1779-89-R: London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Durham Memorial Hospital (Respondent)

Unit: "all paramedical employees of the respondent in the Town of Durham, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and employees in bargaining units for which any trade union held bargaining rights as of October 17, 1989" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

3164-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. MPS Carpentry (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Board Area 8 in all sectors of the construction industry, save and except the industrial, commercial and institutional sector of the construction industry" (5 employees in unit)

Number of names of persons on list as originally prepared by employer	2
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

1379-89-R; 1388-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. 715530 Ontario Inc. c.o.b. Bradley Utility Contractors (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0

Applications for Certification Dismissed Without Vote

0532-88-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Ontario Bus Industries Inc. (Respondent) v. Group of Employees (Objectors) (337 employees in unit)

1565-89-R: Canadian Union of Public Employees (Applicant) v. Provincial Nursing & Retirement Centre Inc. (Respondent) Unit #1 (see *Bargaining Agents Certified Without Vote*) Unit #2 (30 employees in unit) (*Dismissed*)

1702-89-R: Ontario Control Federation (O.C.F.) (Applicant) v. Enera Electrical & Building Controls (Respondent) (9 employees in unit)

1722-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. General Seating of Canada Ltd. (Respondent) (74 employees in unit)

1818-89-R: Carleton University Officers' Association (Applicant) v. Carleton University (Respondent) v. United Steelworkers of America (Intervener #1) v. Canadian Guards Association (Intervener #2) (26 employees in unit)

1844-89-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Clover Catering Inc. (Respondent) Unit #1 (see *Bargaining Agents Certified Without Vote*) Unit #2 (*Dismissed*) (9 employees in unit)

2087-89-R: United Food & Commercial Workers International Union (Applicant) v. Canada Dry Bottling Company Ltd. (Respondent) v. Group of Employees (Objectors) (26 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1667-89-R: Canadian Union of Public Employees (Applicant) v. Kent County Roman Catholic Separate School Board (Respondent) v. Group of Employees (Objectors)

Unit: "all office, clerical and technical employees of the respondent in the County of Kent, save and except business officers, persons above the rank of business officer, French translator, secretary to the Director of Education, secretary to the Assistant Director, secretary to the Superintendent of Business, secretaries to the Superintendent of Schools, secretary to the Manager of Human Resources and employees in bargaining units for which any trade union held bargaining rights as of October 4, 1989" (62 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	53
Number of persons who cast ballots	50
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	25

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1490-89-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Repla Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Regional Municipality of Durham, save and except forepersons, persons above the rank of foreperson, students employed during the school vacation period, persons regularly employed for not more than 24 hours per week, office and sales staff and security guards" (24 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	22
Number of persons who cast ballots	22
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	11

1789-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Delhi Industries Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Brantford, save and except foremen, persons above the rank of foreman, office and sales staff" (29 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	31
Number of persons who cast ballots	26
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	19

Applications for Certification Withdrawn

0152-89-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Bay Tower

Homes Company Ltd., Bay Tower Management Ltd., Ledi Properties Inc., 518270 Ontario Ltd. and 554614 Ontario Ltd. (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener)

0290-89-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Stolp Building Corporation (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

0643-89-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Mallett Inc., Wafer-board Corporation Ltd., Mallet Transport & Pen Horwood Construction (Respondents)

1212-89-R: (Ontario Controls Federation) O.C.F. Alex Boodhoo (Applicant) v. Enera Controls Inc. (Respondent)

1618-89-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Torino Drywall (Barrie) Ltd. (Respondent)

1660-89-R: United Brotherhood of Carpenters & Joiners of America, Local 675 (Applicant) v. Torino Drywall (Barrie) Ltd. (Respondent)

1773-89-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 527 (Applicant) v. Torus Construction Ltd. & Alfa Construction Ltd. (Respondents)

1906-89-R: Service Employees Union, Local 813 (Applicant) v. North Hastings District Hospital c.o.b. as Belleville General Hospital (Respondent)

1925-89-R: Canadian Union of Heavy Haulers & Maintenance Workers (Applicant) v. Sure-Way Transport (U.S.) Inc. (Respondent)

2103-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Venasse D.J. & Construction Ltd. (Respondent)

2127-89-R: Greater Northern Ontario Trucking Association (Applicant) v. Ethier Contractors (Sudbury) Ltd. (Respondent) v. Labourers' International Union of North America, Local 493 (Intervener)

2174-89-R: Transport Drivers, Warehousemen & General Workers, Local 106 (Teamsters) (Applicant) v. WMI Hull Ottawa (Respondent)

2180-89-R; 2181-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. D.J. Venasse Construction Ltd. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

2187-89-FC: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Construction 2000, Division of 704039 Ontario Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3120-88-R: I.B.E.W. Construction Council of Ontario, International Brotherhood of Electrical Workers, Locals 105 & 353 (Applicants) v. P & M Electric Ltd., Pomico Holdings Inc., P & M Electric (1982) Ltd., Northland Electric (Ont.) Ltd. (Respondents) (*Dismissed*)

0216-89-R: Labourers' International Union of North America, Local 506 (Applicant) v. 440770 Ontario Ltd., c.o.b. Rosscor Construction and 508656 Ontario Ltd. c.o.b. as Rosscor General Contractors (Respondents) (*Withdrawn*)

1123-89-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Dufferin Roofing Ltd., Italia Roofing Company (Respondents) (*Dismissed*)

1416-89-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Enzo Testaguzza c.o.b. as Regina Ornamental Iron Works Co., Enzo & Frank Testaguzza c.o.b. as Regina Steel & Regina Steel Ltd. (Respondents) (*Dismissed*)

1453-89-R: United Brotherhood of Carpenters & Joiners of America, Local 38 (Applicant) v. Doral Holdings Ltd., 430635 Ontario Inc. and Woodlawn & Niagara Developments Inc. (Respondents) (*Granted*)

1500-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. L.G.G.C. (Respondent) (*Withdrawn*)

1501-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Alfa Construction Inc. (Respondent) (*Withdrawn*)

1824-89-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Lonco Construction Ltd., Caradon Developments Inc., 780632 Ontario Ltd., 598948 Ontario Ltd., Carapella Investments Ltd., Landvern Developments Ltd. (Respondents) (*Withdrawn*)

2101-89-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Lonco Construction Ltd. and D.L. Concrete Forming (Respondent) (*Withdrawn*)

SALE OF A BUSINESS

3120-88-R: I.B.E.W. Construction Council of Ontario, International Brotherhood of Electrical Workers, Locals 105 & 353 (Applicants) v. P & M Electric Ltd., Pomico Holdings Inc., P & M Electric (1982) Ltd., Northland Electric (Ont.) Ltd. (Respondents) (*Dismissed*)

0216-89-R: Labourers' International Union of North America, Local 506 (Applicant) v. 440770 Ontario Ltd., c.o.b. Rosscor Construction and 508656 Ontario Ltd. c.o.b. as Rosscor General Contractors (Respondents) (*Withdrawn*)

1055-89-R: Salaried Employees Alliance ComDev (Applicant) v. Senstar Corporation (Respondent) v. Employees' Association Computing Devices Company (Intervener) (*Granted*)

1123-89-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Dufferin Roofing Ltd., Italia Roofing Company (Respondents) (*Dismissed*)

1218-89-R: Employees' Association Computing Devices Company (Applicant) v. Senstar Corporation (Respondent) (*Dismissed*)

1417-89-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Enzo Testaguzza c.o.b. as Regina Ornamental Iron Works Co., Enzo & Frank Testaguzza c.o.b. as Regina Steel & Regina Steel Ltd. (Respondents) (*Dismissed*)

1453-89-R: United Brotherhood of Carpenters & Joiners of America, Local 38 (Applicant) v. Doral Holdings Ltd., 430635 Ontario Inc. and Woodlawn & Niagara Developments Inc. (Respondents) (*Granted*)

1500-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. L.G.G.C. (Respondent) (*Withdrawn*)

1501-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Alfa Construction Inc. (Respondent) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

0591-89-R; 0592-89-R: Canadian Union of Public Employees (Applicant) v. The Hamilton-Wentworth Roman Catholic Separate School Board Professional Staff Association (Respondent) v. Group of Employees (Objectors) (*Granted*)

0633-89-R: United Steelworkers of America (Applicant) v. Kerr-Addison Employees' Association (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1129-89-R: Albert Edgar Brown (Applicant) v. United Food & Commercial Workers International Union, Local 1000A (Respondent) v. Fisher Scientific Ltd. (Intervener)

Unit: "all office employees of Fisher Scientific, in the Town of Whitby, save and except supervisors, persons above the rank of supervisor, secretary to the Distribution Centre Manager, warehouse, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (15 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	15
Number of persons who cast ballots	15
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	9

1168-89-R: Carl Cole (Applicant) v. United Steelworkers of America, Local 9038 (Respondent) v. D & M Building Supplies Ltd. (Intervener)

Unit: "all employees of the intervener working in D & M Building Supplies at 186 Old Kennedy Road, Milliken, Ontario, L0H 1K0 and D & M Building Supplies at 229 Wallace Ave., Toronto, Ontario, M6P 3N2, save and except foremen, persons above the rank of foreman, office and sales staff" (24 employees in unit) (*Dismissed*)

Number of names of persons on list as originally prepared by employer	24
Number of persons who cast ballots	22
Number of ballots marked in favour of respondent	17
Number of ballots marked against respondent	5

1299-89-R: James Hohmeyer (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Traders Metal Co. Ltd. (Intervener) (10 employees in unit) (*Dismissed*)

1650-89-R: Lillian Diaz (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Hamilton Medical Laboratories (Intervener)

Unit: "all employees employed by the employer at its medical laboratory at Hamilton, Ontario, save and except assistant laboratory manager and those above the rank of assistant laboratory manager, office supervisor (manager) and students employed during the school vacation period" (6 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	4

1757-89-R: Michael Mitchell (Applicant) v. United Steelworkers of America (Respondent) v. Gelderland Ltd. (Intervener)

Unit: "all employees [of the company] working in the Municipality of Metropolitan Toronto save and except

forepersons, persons above the rank of foreperson, office and sales staff and students employed during the school vacation period" (22 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	22
Number of persons who cast ballots	15
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	13

1926-89-R: Employees of W.L. Smith & Associate Ltd. represented by Maxwell Coffey (Applicant) v. Graphic Communications International Union, Local 500M (Respondent) v. W.L. Smith & Associates Ltd. (Intervener) (*Withdrawn*)

1969-89-R: Gwen Doobay (Applicant) v. Hotel Employees & Restaurant Union Employee's International, Local 75 (Respondent) (*Withdrawn*)

1991-89-R: Kevin Connolly (Applicant) v. C.A.W. (Respondent) (33 employees in unit) (*Granted*)

2094-89-R: Ms. Amelia Spencer (Applicant) v. Hotel Restaurant Employees, Local 75 (Respondent) (3 employees in unit) (*Granted*)

2245-89-R: Brian Ferrill (Applicant) v. Canadian Brotherhood of Railway Transport & General Workers (Respondent) (1 employee in unit) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

1583-89-U: Canadian Paperworkers Union (Applicant) v. Patricia Region Senior Services Inc. (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0427-88-U: Ayoob Motala (Complainant) v. Cambridge Towel Corporation (Respondent) (*Dismissed*)

0428-88-U: Ayoob Motala (Complainant) v. Amalgamated Clothing & Textile Workers Union, Local 1441 (Respondent)

(*Dismissed*)

0533-88-U; 1197-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Ontario Bus Industries Inc. (Respondent) (*Granted*)

1751-88-U: Southern Ontario Newspaper Guild, Local 87 (Complainant) v. Polish Alliance Press Ltd. (Respondent) (*Withdrawn*)

1801-88-U: Ontario Nurses' Association (Complainant) v. Sunnybrook Hospital (Respondent) v. Ontario Hospital Association (Intervener) (*Granted*)

2269-88-U: United Steelworkers of America (Complainant) v. Micromar Mfg. Corp. (Respondent) (*Withdrawn*)

2900-88-U: O.P.S.E.U. and its Local 302 (Complainant) v. Uxbridge/Stouffville Ambulance Service, 790711 Ont. Ltd., Mr. P. Carrell, Manager (Respondents) (*Withdrawn*)

3074-88-U: Ontario Nurses' Association (Complainant) v. The Toronto Hospital (Respondent) (*Dismissed*)

0271-89-U: Dino Ceresato (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 195 and National Radiator (Respondents) (*Dismissed*)

0352-89-U: International Association of Machinists & Aerospace Workers, District Lodge 717, Aeronautical Lodge 717 Turbo (Complainant) v. Hawker Siddeley Canada Inc. (Orenda) Division (Respondent) (*Withdrawn*)

0374-89-U: Barbara Vrbos, Roslie Grguric (Complainants) v. Communications & Electrical Workers of Canada (C.W.C.), Local 544 (Respondent) (*Dismissed*)

0503-89-U: Maria Mlakar (Complainant) v. CUPE, Local 79 (Respondent) v. The Municipality of Metropolitan Toronto (Intervener) (*Dismissed*)

0834-89-U: The Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC, AFL-CIO) (Complainant) v. London Free Press Printing Company Ltd. (Respondent) (*Withdrawn*)

1040-89-U: United Brotherhood of Carpenters & Joiners of America, Local 1256 (Complainant) v. High Reach Maintenance Ltd. (Respondent) (*Dismissed*)

1077-89-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. 571252 Ontario Ltd. (c.o.b. as Red Dog Inn, Fort Frances) (Respondent) (*Withdrawn*)

1156-89-U: Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. High Reach Maintenance Ltd. (Respondent) (*Dismissed*)

1251-89-U: Canadian Paperworkers Union and its Local 306 (Complainant) v. Boise Cascade Canada Ltd. (Respondent) (*Dismissed*)

1296-89-U: Labourers' International Union of North America, Local 1059 (Complainant) v. Lonco Construction Ltd. (Respondent) (*Withdrawn*)

1320-89-U: Grace Mangos (Complainant) v. Betty Adamson, President (Respondent) (*Withdrawn*)

1356-89-U: Oswald McLean (Complainant) v. Teamsters, L. 230 (Respondent) (*Withdrawn*)

1401-89-U; 1590-89-U; 2007-89-U: Ontario Secondary School Teachers' Federation (Complainant) v. Kingston Learning Centre Inc. (Respondent) (*Withdrawn*)

1503-89-U: International Union of Operating Engineers, Local 793 (Complainant) v. Traders Metal Company Ltd. (Respondent) (*Withdrawn*)

1506-89-U: Ontario Nurses' Association (Complainant) v. Vera M. Davis Community Care Centre, and Regional Municipality of Peel (Respondent) (*Withdrawn*)

1537-89-U: Jane R. Marks (Complainant) v. Relia Care Inc.; Ontario Nurses Association (Respondents) (*Withdrawn*)

1584-89-U: Canadian Paperworkers Union (Complainant) v. Patricia Region Senior Services Inc. (Respondent) (*Withdrawn*)

1623-89-U: Douglas J. Good (Complainant) v. C & P Lafontaine Excavating (Respondent) (*Withdrawn*)

1624-89-U: Douglas J. Good (Complainant) v. International Union of Operating Engineers, I.U.O.E. (Respondent) (*Withdrawn*)

1700-89-U: Samia Ibrahim (Complainant) v. Gino Pasitano (Employer); George Rouss (Union Rep.) (Respondents) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Intervener) (*Withdrawn*)

1706-89-U: Florence Theresa Levesque (Complainant) v. The Distillery Workers' Union, Local 96 (Respondent) (*Withdrawn*)

1743-89-U: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Complainant) v. Flexitallic Services Canada Inc. and Flexitallic (Canada) Inc. (Respondent) (*Withdrawn*)

1815-89-U: International Beverage Dispensers' & Bartenders' Union, Local 280 of the Hotel & Restaurant Employees' & Bartenders' Int'l Union (Complainant) v. Spadina Hotel (Respondent) (*Withdrawn*)

1817-89-U: International Beverage Dispensers' & Bartenders' Union, Local 280 of the Hotel & Restaurant Employees' & Bartenders' International Union, and Brent Savoy (Complainant) v. The Hotel Selby & Rick Stenhouse (Respondent) (*Withdrawn*)

1857-89-U: International Brotherhood of Electrical Workers, Local 353 (Complainant) v. P & M Electric (1982) Ltd. (Respondent) (*Withdrawn*)

1938-89-U: Jane R. Marks (Complainant) v. Relia Care Inc. (Tecumseh Health Care Centre) (Respondent) (*Withdrawn*)

1992-89-U: Ann Thoms (Complainant) v. Huntsville Dist. Memorial Hospital (Respondent) (*Withdrawn*)

2070-89-U: Anthony Nicolardi (Complainant) v. Elia - Zanatta Holding Ltd. and Bricklayers - Masons Independent Union (Respondents) (*Withdrawn*)

2099-89-U: Jane R. Marks (Complainant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)

2104-89-U: IWA-Canada (Complainant) v. Gordon Trailer Sales & Rentals Ltd. (1989) (Respondent) (*Withdrawn*)

2107-89-U: Canadian Union of Public Employees (Complainant) v. Thorncliffe Place (Respondent) (*Withdrawn*)

2157-89-U: Yari Farenech (Complainant) v. V.K. Mason Co. Ltd. (Respondent) (*Dismissed*)

2158-89-U: Evan Isenor (Complainant) v. V.K. Mason Co. Ltd. (Respondent) (*Dismissed*)

2159-89-U: Douglas A. Yearwood (Complainant) v. V.K. Mason Co. (Respondent) (*Dismissed*)

2173-89-U: Al Spooner & Herb James (Complainants) v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees (Respondent) (*Dismissed*)

2184-89-U: G.B. Stephenson (Gene) (Complainant) v. Canadian Union of Public Employees, Local 1000 (Respondent) (*Withdrawn*)

2188-89-U: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Complainant) v. Construction 2000, Division of 704039 Ontario Ltd. (Respondent) (*Withdrawn*)

2195-89-U: Mohan Singh Bhandhal (Complainant) v. Amalgamated Transit Union, Local 107 (Respondent) (*Dismissed*)

JURISDICTIONAL DISPUTES

0156-89-JD: O.J. Pipelines Inc. (Complainant) v. Labourers' International Union of North America, Local 607, International Union of Operating Engineers (Respondents) (*Withdrawn*)

2166-89-JD: Labourers' International Union of North America, Local 837 (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 38 and Robertson-Yates Corporation Ltd. (Respondents) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1926-88-M: Canadian Union of Public Employees (Applicant) v. Board of Education for the City of Etobicoke (Respondent) (*Granted*)

3007-88-M: County of Essex (Applicant) v. Canadian Union of Public Employees, Local 2974.1 (Respondent) (*Granted*)

1532-89-M: The Board of Governors of Ryerson Polytechnical Institute (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

1880-89-M: Oxford Picture Frame Co. Ltd. (Employer) v. International Union of Allied, Novelty & Production Workers, Local 905 (Trade Union) (*Granted*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1258-89-OH: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 195 (Complainant) v. Wickes Manufacturing Company Ltd. (Windsor Bumper Division) (Respondent) (*Withdrawn*)

1759-89-OH: Ed Rollins (Complainant) v. Pioneer Construction (Respondent) (*Withdrawn*)

1783-89-OH: Robert Leslie (Complainant) v. Continuous Colour Coat Ltd. (Respondent) (*Withdrawn*)

1784-89-OH: Kevin Trainor (Complainant) v. Continuous Color Coat Ltd. (Respondent) (*Withdrawn*)

1910-89-OH: Karen Lee Miller (Complainant) v. Head Office Reference Laboratory (Respondent) (*Withdrawn*)

2031-89-OH: Miriam L. McGullam (Complainant) v. Helena Ferguson & Clayton Ferguson (Respondents) (*Withdrawn*)

ENVIRONMENTAL PROTECTION ACT

2848-88-EP: Vinod Mohindra (Complainant) v. Bakelite Thermosets Ltd. (Respondent) (*Granted*)

COLLEGES COLLECTIVE BARGAINING ACT

1826-89-U: Ontario Public Service Employees Union and its Local 558 (Complainant) v. Centennial College (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2445-83-M: Ontario Sheet Metal Workers Conference (Applicant) v. Ontario Hydro (Respondent) (*Dismissed*)

0441-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 819 (Applicant) v. Calder Mechanical (Respondent) (*Withdrawn*)

3025-88-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 67 (Applicant) v. State Contractors Inc. (Respondent) (*Granted*)

3045-88-G: Labourers' International Union of North America, Local 607 (Applicant) v. O.J. Pipelines Inc. (Respondent) (*Withdrawn*)

3153-88-G: The Operative Plasterers' & Cement Masons' International Association of the United States & Canada, Local No. 172 Restoration Steeplejacks (Applicant) v. Eastern Construction Company Ltd. (Respondent) (*Dismissed*)

0217-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. 440770 Ontario Ltd. c.o.b. Rosscor Construction & 508656 Ontario Ltd. c.o.b. as Rosscor General Contractors (Respondents) (*Withdrawn*)

0493-89-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. P. & M. Electric Ltd., Pomico Holdings Inc., P. & M. Electric (1982) Ltd., Northland Electric (Ont.) Ltd. (Respondents) (*Withdrawn*)

0505-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. G. Tari Ltd. (Respondent) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Intervener) (*Withdrawn*)

0725-89-G: International Brotherhood of Painters & Allied Trades (Applicant) v. The Electrical Power Systems Construction Association (Respondent) (*Withdrawn*)

1269-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Bonfield Construction Co. Ltd. (Respondent) (*Withdrawn*)

1329-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Enzo Testaguzza c.o.b. as Regina Ornamental Iron Works Co. and Regina Steel Ltd. (Respondents) (*Granted*)

1390-89-G; 1391-89-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Macon Drywall Systems (Respondent) (*Withdrawn*)

1418-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Regina Steel Ltd. (Respondent) (*Withdrawn*)

1430-89-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Todd Ramsay Interiors & James R. Todd (Respondents) (*Granted*)

1451-89-G; 2210-89-G: United Brotherhood of Carpenters & Joiners of America, Locals 1316 & 785 (Applicants) v. Losereit Sales & Services Ltd. (Respondent) (*Withdrawn*)

1452-89-G: United Brotherhood of Carpenters & Joiners of America, Local 38 (Applicant) v. Doral Holdings Ltd., 430635 Ontario Inc., and Woodlawn & Niagara Developments Inc. (Respondents) (*Granted*)

1531-89-G: Labourers' International Union of North America, Local 1059 (Applicant) v. 814011 Ontario Ltd. (Respondent) (*Withdrawn*)

1669-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental Ltd. (Respondent) (*Withdrawn*)

1712-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Hisey Rebar Placement (Respondent) (*Granted*)

1780-88-G: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Acme Building & Construction Ltd. (Respondent) (*Dismissed*)

1825-89-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Lonco Construction Ltd., Caradon Developments Inc., 780632 Ontario Ltd., 598948 Ontario Ltd., Carapella Investments Ltd., Landvern Developments Ltd. (Respondents) (*Withdrawn*)

1848-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Super Lift Crane Services (Respondents) (*Withdrawn*)

1909-89-G: Labourers' International Union of North America, Local 1089 (Applicant) v. Ariss Construction Inc. (Respondent) (*Withdrawn*)

1916-89-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. 688193 Ontario Inc. c.o.b. as Top Roofing & Sheet Metal (Respondent) (*Withdrawn*)

1919-89-G: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. Niagara Peninsula Insulation Ltd. (Respondent) (*Withdrawn*)

1922-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. Provincial Cutting & Coring Ltd. (Respondent) (*Granted*)

1947-89-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Carmen Drywall Ltd. (Respondent) (*Granted*)

1953-89-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Humbelco Corporation (Respondent) (*Granted*)

1957-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. City Interior (Respondent) (*Withdrawn*)

1964-89-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Broneff Contractors Inc. (Respondent) (*Withdrawn*)

1975-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Aldoma Steel 712917 Ont. Inc. (Respondent) (*Granted*)

2010-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Dufferin Construction Company (a Division of St. Lawrence Cement Inc.) (Respondent) (*Granted*)

2030-89-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Supercity Dry-wall Ltd. (Respondent) (*Withdrawn*)

2082-89-G: Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 1590 (Applicant) v. P. J. Daly Contracting Ltd. (Respondent) (*Withdrawn*)

2084-89-G: International Union of Bricklayers & Allied Craftsmen, Local 25 (Applicant) v. B & F Masonry Ltd. (Respondent) (*Granted*)

2098-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Violin Railroad Construction Company Ltd. (Respondent) (*Withdrawn*)

2108-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Itarcan Construction Inc. (Respondent) (*Granted*)

2116-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Mississauga Construction (786713 Ontario Ltd.) (Respondent) (*Granted*)

2119-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Petermar Carpentry Inc. (Respondent) (*Withdrawn*)

2132-89-G; 2133-89-G: Labourers' International Union of North America, Local 493 (Applicant) v. Laam-anen Construction Ltd. (Respondent) (*Withdrawn*)

2137-89-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Kerdea Masonry Ltd. (Respondent) (*Granted*)

2150-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. Division Construction (Respondent) (*Withdrawn*)

2160-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Repete Inc. (Respondent) (*Withdrawn*)

2179-89-G: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. Inscan Contractors (Ontario) Inc. (Respondent) (*Granted*)

2211-89-G: United Brotherhood of Carpenters & Joiners of America, Local 1316 (Applicant) v. Losereit Sales & Services Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0056-85-U; 0058-85-U; 1270-85-R: James Meikle et al (Complainants) v. Retail, Wholesale & Department Store Union Local 414 and the Great Atlantic and Pacific Tea Company of Canada Limited (Respondents) v. Edward Jenner and John Yuill, (Intervener #1) v. Dominion Stores Limited (Intervener #2); Tom Hinton (Complainant) v. Retail, Wholesale & Department Store Union and Don Collins (Respondents) v. A Group of Employees at the Toronto Area Great Atlantic & Pacific Company Limited, Warehouses (Intervener); James Meikle and Tom Hinton and a Group of Employees (Applicant) v. Great Atlantic and Pacific Tea Company Limited and Retail, Wholesale & Department Store Union, Local 414 (Respondents) v. Dominion Stores Limited/Willett Foods Limited (Intervener) (*Dismissed*)

2382-88-U: Energy & Chemical Workers Union, (Complainant) v. G. Lemaire & Chinook Chemicals Company (Respondents) (*Dismissed*)

2754-88-U: Graphic Communications International Union, Local 500M (Complainant) v. Paragon Industrial Photographic Reproductions Ltd. (Respondent) (*Dismissed*)

1440-89-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Canadian Structural Restoration Ltd. (Respondent) (*Dismissed*)

1937-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Ta-Mari Construction Ltd. (Respondent) (*Dismissed*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

920N
LP
254

ONTARIO LABOUR RELATIONS BOARD REPORTS

February 1990



ONTARIO LABOUR RELATIONS BOARD

Chair M.G. MITCHNICK

Alternate Chair R.O. MACDOWELL

Vice-Chairs

M. BENDEL
L. DAVIE
N.V. DISSANAYAKE
R.A. FURNESS
O.V. GRAY
R.J. HERMAN
B. HERLICH
R.D. HOWE
B. KELLER
P. KNOPF
J. McCORMACK
M. NAIRN
K. O'NEIL
K. PETRYSHEN
N.B. SATTERFIELD
I.M. STAMP
G. SURDYKOWSKI
S.A. TACON

Members

J. ANDERSON	T. MEAGHER
B.L. ARMSTRONG	R.R. MONTAGUE
C.A. BALLENTINE	J.W. MURRAY
F.C. BURNET	W.S. O'NEILL
W.A. CORRELL	D.A. PATTERSON
K.S. DAVIES	H. PEACOCK
A.R. FOUCAULT	R.W. PIRRIE
W.N. FRASER	J. REDSHAW
W. GIBSON	K.V. ROGERS
P.V. GRASSO	J.A. RONSON
A. HERSHKOVITZ	M.A. ROSS
M. JONES	M. ROZENBERG
F. KELLY	J.A. RUNDLE
J. KENNEDY	G.O. SHAMANSKI
H. KOBRYN	R.M. SLOAN
J. KURCHAK	E.G. THEOBALD
J. LEAR	J. TRIM
D.A. MacDONALD	M. VUKOBRAT
W.J. McCARRON	S. WESLAK
C. McDONALD	W.H. WIGHTMAN
R.D. McMURDO	N.A. WILSON
	D.G. WOZNIAK

Registrar T.A. INNISS

Board Solicitors K.A. MacDONALD
P.S. TOOP



ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1990] OLRB REP. FEBRUARY

EDITOR: PERCY TOOP

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario

CASES REPORTED

1.	Blue Bell Canada Incorporated; Re U.S.W.A.; Re Group of Employees.....	121
2.	C.T. Transport, Division of McKinlay Transport Ltd.; Re John Brodhagen; Re Teamsters, Local 938	128
3.	Coalition of Laid-Off Workers, The, Ontario, Canada. Hereinafter Known as the C.L.W.; Re C.A.W., Locals 439 and 458; Re Varsity Corporation	129
4.	Gilbert Steel Limited; Re B.S.O.I.W., Local 721, George Joncas, Alfie Thomas, and Aaron Murphy on their own and on behalf of the Respondent Union; Re Electrical Power Systems Construction Association, Ontario Hydro; Re B.S.O.I.W., Local 721, on behalf of its Reinforcing Rodmen Named in Schedule "B" to the complaint; Re B.S.O.I.W., Local 721, George Joncas, Alfie Thomas, John Donaldson and Aaron Murphy	136
5.	Gilmore, Glen A.; Re C.A.W. T.C.A.; Re John Deere Welland Works.....	157
6.	Goody Canada Limited; Re A.C.T.W.U.	159
7.	Hully Gully London Ltd.; Re Ronald Gary Emmons; Re R.W.D.S.U., AFL, CIO, CLC ...	160
8.	Hy's Steak House, Hydon Holdings Ltd. c.o.b. as; Re R.W.D.S.U., AFL-CIO-CLC.....	163
9.	Knob Hill Farms Limited; Re U.F.C.W., Local 206, Re Group of Employees	169
10.	McIntyre, Robert; Re U.S.W.A., Local 14045; Re Zalev Brothers Limited.....	175
11.	Newmarch Inc. and U.A., Local 463; Re B.S.O.I.W., Local 721; Re Millwright District Council of Ontario, on its own behalf and on behalf of Local 2309179	179
12.	Plaza Fiberglas Manufacturing Limited and Plaza Electro-Plating Ltd., Citcor Manufacturing Ltd. and Sabina Citron; Re U.S.W.A.....	192
13.	Rosmar Drywall & Acoustics Limited; Re C.J.A., Local 785	214
14.	Saco Fisheries Limited; Re Great Lakes Fishermen and Allied Workers' Union.....	217
15.	Standard Industrial Technologies Inc.; Re United Employees of Standard Industrial Technologies Inc.	220

SUBJECT INDEX

- Arbitration - Duty of Fair Representation - Judicial Review - Unfair Labour Practice - Bargaining unit members petitioning union to seek judicial review of arbitration decision - Union declining to seek review - Refusal based solely on legal opinions on chances of success - Board applying same standard as to decision whether to arbitrate a grievance - Union not obliged to seek review even if review supported by unit members - Union not obliged to seek review where chance of success - Union entitled to refuse on merits in context of other considerations grounded in union's role as exclusive bargaining agent and collective bargaining - Union failure to explain reasons not breach of duty - Complaint dismissed
- McINTYRE, ROBERT; RE U.S.W.A., LOCAL 14045; RE ZALEV BROTHERS LIMITED 175
- Certification - Certification Where Act Contravened - Fraud - Reconsideration - Employer requesting reconsideration of certification on grounds union failed to inform Board of material change in circumstances relevant to exercise of Board's discretion - Local union executive approved merger with other locals while certification application before Board - Members not notified or attending merger meeting - Union treating members as "members awaiting contract coverage" without full rights of active members, including right to vote on merger resolution - Employer alleging union's failure to inform Board of circumstances surrounding merger resolution constituting misrepresentation and fraud - Majority rejecting employer allegations - Information not material change or relevant to exercise of Board's discretion - Local union continuing in existence - Union members within statutory definition of term - Application dismissed
- KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206; RE GROUP OF EMPLOYEES 169
- Certification - Natural Justice - Practice and Procedure - Trade Union - Union filing membership evidence - Union name on cards different from name under which application brought - Board will not treat application for membership as membership in another union unless former is local of latter - Board satisfied application intended to be brought by union named on membership cards - Board permitting amendment to union name on application - Board extending terminal date and directing new posting of Form 6 Notice of Application at workplace
- GOODY CANADA LIMITED; RE A.C.T.W.U. 159
- Certification - Petition - Employees reasonably believing petitioners were meeting with owner - Employees believing owner had threatened plant closure if union organizing successful - Statements by petitioners leading employees to believe unionization would result in loss of benefits - Board unable to accept petition as voluntary expression of employee wishes - Certificate issuing
- BLUE BELL CANADA INCORPORATED; RE U.S.W.A.; RE GROUP OF EMPLOYEES 121
- Certification - Trade Union Status - Officer of applicant testifying as to steps taken by employees to form trade union - Draft constitution reviewed, amended, and adopted - Terms of constitution sufficiently comprehensive to allow Board to conclude applicant was viable organization formed for purposes of representing employees in their labour relations - Applicant falling within statutory definition of trade union
- STANDARD INDUSTRIAL TECHNOLOGIES INC.; RE UNITED EMPLOYEES OF STANDARD INDUSTRIAL TECHNOLOGIES INC. 220

II

Certification Where Act Contravened - Certification - Fraud - Reconsideration - Employer requesting reconsideration of certification on grounds union failed to inform Board of material change in circumstances relevant to exercise of Board's discretion - Local union executive approved merger with other locals while certification application before Board - Members not notified or attending merger meeting - Union treating members as "members awaiting contract coverage" without full rights of active members, including right to vote on merger resolution - Employer alleging union's failure to inform Board of circumstances surrounding merger resolution constituting misrepresentation and fraud - Majority rejecting employer allegations - Information not material change or relevant to exercise of Board's discretion - Local union continuing in existence - Union members within statutory definition of term - Application dismissed	
KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206; RE GROUP OF EMPLOYEES	169
Change in Working Conditions - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Employer dismissing employee involved in organizing campaign and sitting on bargaining committee - Dismissal occurring during "statutory freeze" period - Employee dismissed for irregularities in credit card vouchers - Board satisfied on balance reasons given by employer were only reasons for dismissal - Complaint dismissed	
HY'S STEAK HOUSE, HYDON HOLDINGS LTD. C.O.B. AS; RE R.W.D.S.U., AFL-CIO-CLC	163
Constitutional Law - Duty of Fair Representation - Agreed facts indicating employer engaged in interprovincial trucking - Business subject to <i>Canada Labour Code</i> and not <i>Labour Relations Act</i> - Board having no jurisdiction - Complaint dismissed	
C.T. TRANSPORT, DIVISION OF McKINLAY TRANSPORT LTD.; RE JOHN BRODHAGEN; RE TEAMSTERS, LOCAL UNION 938	128
Construction Industry - Construction Industry Grievance - Health and Safety - Employer arranging health and safety training session for Workplace Hazardous Materials Information System on Friday afternoon - Session held at union hall and open to union members only - Union business representatives attending - Employer and union cooperating in providing refreshments - <i>Occupational Health and Safety Act</i> requiring employer to provide instructions but silent on payment - Employer failing to inform employees at meeting that attendance voluntary and unpaid - Employees entitled to wages and benefits for time at session	
ROSMAR DRYWALL & ACOUSTICS LIMITED; RE C.J.A., LOCAL 785	214
Construction Industry - Health and Safety - Strike - Unfair Labour Practice - Employer requiring all employees to wear bellyhooks, whether or not needed in work - Employees believing bellyhooks unsafe and refusing to wear as way of demonstrating refusal to use under any circumstances - Employer refusing to assign work to employees refusing to wear bellyhooks - Employer seeking illegal strike declaration and damages - Employees alleging reprisal contrary to <i>Occupational Health and Safety Act</i> - Refusal not justified under <i>Occupational Health and Safety Act</i> since mere wearing of bellyhooks not alleged to endanger - No refusal to work since no work assigned - Complaints and application dismissed	
GILBERT STEEL LIMITED; RE B.S.O.I.W. LOCAL 721, GEORGE JONCAS, ALFIE THOMAS, AND AARON MURPHY ON THEIR OWN BEHALF AND ON BEHALF OF THE RESPONDENT UNION; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, ONTARIO HYDRO RE B.S.O.I.W., LOCAL 721, ON BEHALF OF ITS REINFORCING RODMEN NAMED IN SCHEDULE "B" TO THE COMPLAINT; RE B.S.O.I.W., LOCAL 721, GEORGE JONCAS, ALFIE THOMAS, JOHN DONALDSON AND AARON MURPHY	136
Construction Industry - Jurisdictional Dispute - Handling and installation of Hollywood Rail,	

Louden Rail, and support steel - Board considering collective bargaining relationships, skill and training, economy and efficiency, employer practice, area or industry practice, and employer preference - Board rejecting "end use" as appropriate consideration - Board directing work to be assigned to Ironworkers and Millwrights

NEWMARCH INC. AND U.A., LOCAL 463; RE B.S.O.I.W. LOCAL 721; RE MILL-WRIGHT DISTRICT COUNCIL OF ONTARIO, ON ITS OWN BEHALF AND ON BEHALF OF LOCAL 2309..... 179

Construction Industry Grievance - Construction Industry - Health and Safety - Employer arranging health and safety training session for Workplace Hazardous Materials Information System on Friday afternoon - Session held at union hall and open to union members only - Union business representatives attending - Employer and union cooperating in providing refreshments - *Occupational Health and Safety Act* requiring employer to provide instructions but silent on payment - Employer failing to inform employees at meeting that attendance voluntary and unpaid - Employees entitled to wages and benefits for time at session

ROSMAR DRYWALL & ACOUSTICS LIMITED; RE C.J.A., LOCAL 785..... 214

Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Lockout - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches, to pay union's negotiating costs, to return work to original company and make no further movement without disclosure to union, to provide union with names and addresses of bargaining unit employees as of lockout date, and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees

PLAZA FIBERGLAS MANUFACTURING LIMITED AND PLAZA ELECTRO-PLATING LTD., CITCOR MANUFACTURING LTD., AND SABINA CITRON; RE U.S.W.A. 192

Duty of Fair Representation - Arbitration - Judicial Review - Unfair Labour Practice - Bargaining unit members petitioning union to seek judicial review of arbitration decision - Union declining to seek review - Refusal based solely on legal opinions on chances of success - Board applying same standard as to decision whether to arbitrate a grievance - Union not obliged to seek review even if review supported by unit members - Union not obliged to seek review where chance of success - Union entitled to refuse on merits in context of other considerations grounded in union's role as exclusive bargaining agent and collective bargaining - Union failure to explain reasons not breach of duty - Complaint dismissed

McINTYRE, ROBERT; RE U.S.W.A., LOCAL 14045; RE ZALEV BROTHERS LIMITED..... 175

Duty of Fair Representation - Constitutional Law - Agreed facts indicating employer engaged in interprovincial trucking - Business subject to *Canada Labour Code* and not *Labour Relations Act* - Board having no jurisdiction - Complaint dismissed

C.T. TRANSPORT, DIVISION OF McKINLAY TRANSPORT LTD.; RE JOHN BRODHAGEN; RE TEAMSTERS, LOCAL UNION 938..... 128

IV

Duty of Fair Representation - Evidence - Practice and Procedure - Complainants providing insufficient particulars - Board reviewing legal authority and labour relations rationale for provision of sufficient particulars in advance - Board explaining what particulars are and providing examples - Board distinguishing particulars from evidence - Board directing complainants to provide sufficient particulars in writing

COALITION OF LAID-OFF WORKERS, THE, ONTARIO, CANADA. HEREINAFTER KNOWN AS THE C.L.W.; C.A.W., LOCALS 439 AND 458; RE VARIETY CORPORATION

129

Duty to Bargain in Good Faith - Damages - Final Offer Vote - Interference in Trade Unions - Lockout - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches, to pay union's negotiating costs, to return work to original company and make no further movement without disclosure to union, to provide union with names and addresses of bargaining unit employees as of lockout date, and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees

PLAZA FIBERGLAS MANUFACTURING LIMITED AND PLAZA ELECTROPLATING LTD., CITCOR MANUFACTURING LTD., AND SABINA CITRON; RE U.S.W.A.

192

Evidence - Duty of Fair Representation - Practice and Procedure - Complainants providing insufficient particulars - Board reviewing legal authority and labour relations rationale for provision of sufficient particulars in advance - Board explaining what particulars are and providing examples - Board distinguishing particulars from evidence - Board directing complainants to provide sufficient particulars in writing

COALITION OF LAID-OFF WORKERS, THE, ONTARIO, CANADA. HEREINAFTER KNOWN AS THE C.L.W.; C.A.W., LOCALS 439 AND 458; RE VARIETY CORPORATION

129

Evidence - Termination - Petition - Inadequate first hand evidence of origination and preparation of petition - Gaps in evidence of custody - Incomplete evidence on circulation of petition and circumstances surrounding each signature - Evidence inconsistent - Board unable to accept petition as voluntary expression of employee wishes - Application dismissed

HULLY GULLY LONDON LTD.; RE RONALD GARY EMMONS; RE R.W.D.S.U., AFL, CIO, CLC

160

Final Offer Vote - Damages - Duty to Bargain in Good Faith - Interference in Trade Unions - Lockout - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease

and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches, to pay union's negotiating costs, to return work to original company and make no further movement without disclosure to union, to provide union with names and addresses of bargaining unit employees as of lockout date, and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees

PLAZA FIBERGLAS MANUFACTURING LIMITED AND PLAZA ELECTRO-
PLATING LTD., CITCOR MANUFACTURING LTD., AND SABINA CITRON; RE
U.S.W.A.

192

Fraud - Certification - Certification Where Act Contravened - Reconsideration - Employer requesting reconsideration of certification on grounds union failed to inform Board of material change in circumstances relevant to exercise of Board's discretion - Local union executive approved merger with other locals while certification application before Board - Members not notified or attending merger meeting - Union treating members as "members awaiting contract coverage" without full rights of active members, including right to vote on merger resolution - Employer alleging union's failure to inform Board of circumstances surrounding merger resolution constituting misrepresentation and fraud - Majority rejecting employer allegations - Information not material change or relevant to exercise of Board's discretion - Local union continuing in existence - Union members within statutory definition of term - Application dismissed

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206; RE GROUP OF
EMPLOYEES

169

Health and Safety - Construction Industry - Construction Industry Grievance - Employer arranging health and safety training session for Workplace Hazardous Materials Information System on Friday afternoon - Session held at union hall and open to union members only - Union business representatives attending - Employer and union cooperating in providing refreshments - *Occupational Health and Safety Act* requiring employer to provide instructions but silent on payment - Employer failing to inform employees at meeting that attendance voluntary and unpaid - Employees entitled to wages and benefits for time at session

ROSMAR DRYWALL & ACOUSTICS LIMITED; RE C.J.A., LOCAL 785.....

214

Health and Safety - Construction Industry - Strike - Unfair Labour Practice - Employer requiring all employees to wear bellyhooks, whether or not needed in work - Employees believing bellyhooks unsafe and refusing to wear as way of demonstrating refusal to use under any circumstances - Employer refusing to assign work to employees refusing to wear bellyhooks - Employer seeking illegal strike declaration and damages - Employees alleging reprisal contrary to *Occupational Health and Safety Act* - Refusal not justified under *Occupational Health and Safety Act* since mere wearing of bellyhooks not alleged to endanger - No refusal to work since no work assigned - Complaints and application dismissed

GILBERT STEEL LIMITED; RE B.S.O.I.W. LOCAL 721, GEORGE JONCAS,
ALFIE THOMAS, AND AARON MURPHY ON THEIR OWN BEHALF AND ON
BEHALF OF THE RESPONDENT UNION; RE ELECTRICAL POWER SYSTEMS
CONSTRUCTION ASSOCIATION, ONTARIO HYDRO RE B.S.O.I.W., LOCAL 721,
ON BEHALF OF ITS REINFORCING RODMEN NAMED IN SCHEDULE "B" TO
THE COMPLAINT; RE B.S.O.I.W., LOCAL 721, GEORGE JONCAS, ALFIE
THOMAS, JOHN DONALDSON AND AARON MURPHY

136

Interference in Trade Unions - Change in Working Conditions - Intimidation and Coercion - Unfair Labour Practice - Employer dismissing employee involved in organizing campaign and sitting on bargaining committee - Dismissal occurring during "statutory freeze" period -

Employee dismissed for irregularities in credit card vouchers - Board satisfied on balance reasons given by employer were only reasons for dismissal - Complaint dismissed

HY'S STEAK HOUSE, HYDON HOLDINGS LTD. C.O.B. AS; RE R.W.D.S.U.,
AFL-CIO-CLC 163

Interference in Trade Unions - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Lockout - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches, to pay union's negotiating costs, to return work to original company and make no further movement without disclosure to union, to provide union with names and addresses of bargaining unit employees as of lockout date, and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees

PLAZA FIBERGLAS MANUFACTURING LIMITED AND PLAZA ELECTRO-
PLATING LTD., CITCOR MANUFACTURING LTD., AND SABINA CITRON; RE
U.S.W.A. 192

Intimidation and Coercion - Change in Working Conditions - Interference in Trade Unions - Unfair Labour Practice - Employer dismissing employee involved in organizing campaign and sitting on bargaining committee - Dismissal occurring during "statutory freeze" period - Employee dismissed for irregularities in credit card vouchers - Board satisfied on balance reasons given by employer were only reasons for dismissal - Complaint dismissed

HY'S STEAK HOUSE, HYDON HOLDINGS LTD. C.O.B. AS; RE R.W.D.S.U.,
AFL-CIO-CLC 163

Judicial Review - Arbitration - Duty of Fair Representation - Unfair Labour Practice - Bargaining unit members petitioning union to seek judicial review of arbitration decision - Union declining to seek review - Refusal based solely on legal opinions on chances of success - Board applying same standard as to decision whether to arbitrate a grievance - Union not obliged to seek review even if review supported by unit members - Union not obliged to seek review where chance of success - Union entitled to refuse on merits in context of other considerations grounded in union's role as exclusive bargaining agent and collective bargaining - Union failure to explain reasons not breach of duty - Complaint dismissed

McINTYRE, ROBERT; RE U.S.W.A., LOCAL 14045; RE ZALEV BROTHERS
LIMITED 175

Judicial Review - Practice and Procedure - Remedies - Stay - Union letter to Board alleging employer not complying with Board order - Union seeking filing of Board order with Court for enforcement - Employer letter to Board arguing enforcement proceedings inappropriate while appeal on jurisdictional issue still before courts - Employer letter satisfying Board of non-compliance - Union entitled to enforcement in absence of Court stay, even if appeal or judicial review in progress - Board dispensing with non-compliance hearing and directing filing of decision with Court

SACO FISHERIES LIMITED; RE GREAT LAKES FISHERMEN AND ALLIED
WORKERS' UNION 217

Jurisdictional Dispute - Construction Industry - Handling and installation of Hollywood Rail, Loudon Rail, and support steel - Board considering collective bargaining relationships, skill and training, economy and efficiency, employer practice, area or industry practice, and employer preference - Board rejecting "end use" as appropriate consideration - Board directing work to be assigned to Ironworkers and Millwrights

NEWMARCH INC. AND U.A., LOCAL 463; RE B.S.O.I.W. LOCAL 721; RE MILL-WRIGHT DISTRICT COUNCIL OF ONTARIO, ON ITS OWN BEHALF AND ON BEHALF OF LOCAL 2309..... 179

Lockout - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches, to pay union's negotiating costs, to return work to original company and make no further movement without disclosure to union, to provide union with names and addresses of bargaining unit employees as of lockout date, and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees

PLAZA FIBERGLAS MANUFACTURING LIMITED AND PLAZA ELECTRO-PLATING LTD., CITCOR MANUFACTURING LTD., AND SABINA CITRON; RE U.S.W.A. 192

Natural Justice - Certification - Practice and Procedure - Trade Union - Union filing membership evidence - Union name on cards different from name under which application brought - Board will not treat application for membership as membership in another union unless former is local of latter - Board satisfied application intended to be brought by union named on membership cards - Board permitting amendment to union name on application - Board extending terminal date and directing new posting of Form 6 Notice of Application at workplace

GOODY CANADA LIMITED; RE A.C.T.W.U. 159

Practice and Procedure - Certification - Natural Justice - Trade Union - Union filing membership evidence - Union name on cards different from name under which application brought - Board will not treat application for membership as membership in another union unless former is local of latter - Board satisfied application intended to be brought by union named on membership cards - Board permitting amendment to union name on application - Board extending terminal date and directing new posting of Form 6 Notice of Application at workplace

GOODY CANADA LIMITED; RE A.C.T.W.U. 159

Practice and Procedure - Duty of Fair Representation - Evidence - Complainants providing insufficient particulars - Board reviewing legal authority and labour relations rationale for provision of sufficient particulars in advance - Board explaining what particulars are and provid-

VIII

ing examples - Board distinguishing particulars from evidence - Board directing complainants to provide sufficient particulars in writing	
COALITION OF LAID-OFF WORKERS, THE, ONTARIO, CANADA. HEREINAFTER KNOWN AS THE C.L.W.; C.A.W., LOCALS 439 AND 458; RE VARIETY CORPORATION	129
Practice and Procedure - Judicial Review - Remedies - Stay - Union letter to Board alleging employer not complying with Board order - Union seeking filing of Board order with Court for enforcement - Employer letter to Board arguing enforcement proceedings inappropriate while appeal on jurisdictional issue still before courts - Employer letter satisfying Board of non-compliance - Union entitled to enforcement in absence of Court stay, even if appeal or judicial review in progress - Board dispensing with non-compliance hearing and directing filing of decision with Court	
SACO FISHERIES LIMITED; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION.....	217
Petition - Certification - Employees reasonably believing petitioners were meeting with owner - Employees believing owner had threatened plant closure if union organizing successful - Statements by petitioners leading employees to believe unionization would result in loss of benefits - Board unable to accept petition as voluntary expression of employee wishes - Certificate issuing	
BLUE BELL CANADA INCORPORATED; RE U.S.W.A.; RE GROUP OF EMPLOYEES	121
Petition - Termination - Evidence - Inadequate first hand evidence of origination and preparation of petition - Gaps in evidence of custody - Incomplete evidence on circulation of petition and circumstances surrounding each signature - Evidence inconsistent - Board unable to accept petition as voluntary expression of employee wishes - Application dismissed	
HULLY GULLY LONDON LTD.; RE RONALD GARY EMMONS; RE R.W.D.S.U., AFL, CIO, CLC	160
Reconsideration - Certification - Certification Where Act Contravened - Fraud - Employer requesting reconsideration of certification on grounds union failed to inform Board of material change in circumstances relevant to exercise of Board's discretion - Local union executive approved merger with other locals while certification application before Board - Members not notified or attending merger meeting - Union treating members as "members awaiting contract coverage" without full rights of active members, including right to vote on merger resolution - Employer alleging union's failure to inform Board of circumstances surrounding merger resolution constituting misrepresentation and fraud - Majority rejecting employer allegations - Information not material change or relevant to exercise of Board's discretion - Local union continuing in existence - Union members within statutory definition of term - Application dismissed	
KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206; RE GROUP OF EMPLOYEES	169
Religious Exemption - Applicant opposed certification because no vote held and because he believed it created workplace disharmony - Applicant objecting to potential use of union dues for non-collective bargaining purposes - Applicant objecting as Christian to union defiance of company through strikes or negotiation pressure - Applicant signing union membership card on mistaken belief he would have to join union - Board not satisfied that objection to paying dues motivated by religious beliefs - Objection to paying dues based on dissatisfaction with certification process and nature of union representation - Application dismissed	
GILMORE, GLEN A; Re C.A.W. T.C.A.; RE JOHN DEERE WELLAND WORKS.....	157

Remedies - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Lockout - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches, to pay union's negotiating costs, to return work to original company and make no further movement without disclosure to union, to provide union with names and addresses of bargaining unit employees as of lockout date, and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees

PLAZA FIBERGLAS MANUFACTURING LIMITED AND PLAZA ELECTRO-PLATING LTD., CITCOR MANUFACTURING LTD., AND SABINA CITRON; RE U.S.W.A.

192

Remedies - Judicial Review - Practice and Procedure - Stay - Union letter to Board alleging employer not complying with Board order - Union seeking filing of Board order with Court for enforcement - Employer letter to Board arguing enforcement proceedings inappropriate while appeal on jurisdictional issue still before courts - Employer letter satisfying Board of non-compliance - Union entitled to enforcement in absence of Court stay, even if appeal or judicial review in progress - Board dispensing with non-compliance hearing and directing filing of decision with Court

SACO FISHERIES LIMITED; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION.....

217

Stay - Judicial Review - Practice and Procedure - Remedies - Union letter to Board alleging employer not complying with Board order - Union seeking filing of Board order with Court for enforcement - Employer letter to Board arguing enforcement proceedings inappropriate while appeal on jurisdictional issue still before courts - Employer letter satisfying Board of non-compliance - Union entitled to enforcement in absence of Court stay, even if appeal or judicial review in progress - Board dispensing with non-compliance hearing and directing filing of decision with Court

SACO FISHERIES LIMITED; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION.....

217

Strike - Construction Industry - Health and Safety - Unfair Labour Practice - Employer requiring all employees to wear bellyhooks, whether or not needed in work - Employees believing bellyhooks unsafe and refusing to wear as way of demonstrating refusal to use under any circumstances - Employer refusing to assign work to employees refusing to wear bellyhooks - Employer seeking illegal strike declaration and damages - Employees alleging reprisal contrary to *Occupational Health and Safety Act* - Refusal not justified under *Occupational*

<i>Health and Safety Act</i> since mere wearing of bellyhooks not alleged to endanger - No refusal to work since no work assigned - Complaints and application dismissed	
GILBERT STEEL LIMITED; RE B.S.O.I.W. LOCAL 721, GEORGE JONCAS, ALFIE THOMAS, AND AARON MURPHY ON THEIR OWN BEHALF AND ON BEHALF OF THE RESPONDENT UNION; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, ONTARIO HYDRO RE B.S.O.I.W., LOCAL 721, ON BEHALF OF ITS REINFORCING RODMEN NAMED IN SCHEDULE "B" TO THE COMPLAINT; RE B.S.O.I.W., LOCAL 721, GEORGE JONCAS, ALFIE THOMAS, JOHN DONALDSON AND AARON MURPHY	136
Termination - Evidence - Petition - Inadequate first hand evidence of origination and preparation of petition - Gaps in evidence of custody - Incomplete evidence on circulation of petition and circumstances surrounding each signature - Evidence inconsistent - Board unable to accept petition as voluntary expression of employee wishes - Application dismissed	
HULLY GULLY LONDON LTD.; RE RONALD GARY EMMONS; RE R.W.D.S.U., AFL, CIO, CLC	160
Trade Union - Certification - Natural Justice - Practice and Procedure - Union filing membership evidence - Union name on cards different from name under which application brought - Board will not treat application for membership as membership in another union unless former is local of latter - Board satisfied application intended to be brought by union named on membership cards - Board permitting amendment to union name on application - Board extending terminal date and directing new posting of Form 6 Notice of Application at workplace	
GOODY CANADA LIMITED; RE A.C.T.W.U.	159
Trade Union Status - Certification - Officer of applicant testifying as to steps taken by employees to form trade union - Draft constitution reviewed, amended, and adopted - Terms of constitution sufficiently comprehensive to allow Board to conclude applicant was viable organization formed for purposes of representing employees in their labour relations - Applicant falling within statutory definition of trade union	
STANDARD INDUSTRIAL TECHNOLOGIES INC.; RE UNITED EMPLOYEES OF STANDARD INDUSTRIAL TECHNOLOGIES INC.	220
Unfair Labour Practice - Arbitration - Duty of Fair Representation - Judicial Review - Bargaining unit members petitioning union to seek judicial review of arbitration decision - Union declining to seek review - Refusal based solely on legal opinions on chances of success - Board applying same standard as to decision whether to arbitrate a grievance - Union not obliged to seek review even if review supported by unit members - Union not obliged to seek review where chance of success - Union entitled to refuse on merits in context of other considerations grounded in union's role as exclusive bargaining agent and collective bargaining - Union failure to explain reasons not breach of duty - Complaint dismissed	
McINTYRE, ROBERT; RE U.S.W.A., LOCAL 14045; RE ZALEV BROTHERS LIMITED	175
Unfair Labour Practice - Change in Working Conditions - Interference in Trade Unions - Intimidation and Coercion - Employer dismissing employee involved in organizing campaign and sitting on bargaining committee - Dismissal occurring during "statutory freeze" period - Employee dismissed for irregularities in credit card vouchers - Board satisfied on balance reasons given by employer were only reasons for dismissal - Complaint dismissed	
HY'S STEAK HOUSE, HYDON HOLDINGS LTD. C.O.B. AS; RE R.W.D.S.U., AFL-CIO-CLC	163
Unfair Labour Practice - Construction Industry - Health and Safety - Strike - Employer requiring	

all employees to wear bellyhooks, whether or not needed in work - Employees believing bellyhooks unsafe and refusing to wear as way of demonstrating refusal to use under any circumstances - Employer refusing to assign work to employees refusing to wear bellyhooks - Employer seeking illegal strike declaration and damages - Employees alleging reprisal contrary to *Occupational Health and Safety Act* - Refusal not justified under *Occupational Health and Safety Act* since mere wearing of bellyhooks not alleged to endanger - No refusal to work since no work assigned - Complaints and application dismissed

GILBERT STEEL LIMITED; RE B.S.O.I.W. LOCAL 721, GEORGE JONCAS, ALFIE THOMAS, AND AARON MURPHY ON THEIR OWN BEHALF AND ON BEHALF OF THE RESPONDENT UNION; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, ONTARIO HYDRO RE B.S.O.I.W., LOCAL 721, ON BEHALF OF ITS REINFORCING RODMEN NAMED IN SCHEDULE "B" TO THE COMPLAINT; RE B.S.O.I.W., LOCAL 721, GEORGE JONCAS, ALFIE THOMAS, JOHN DONALDSON AND AARON MURPHY

136

Unfair Labour Practice - Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Lockout - Remedies - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of addresses for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches, to pay union's negotiating costs, to return work to original company and make no further movement without disclosure to union, to provide union with names and addresses of bargaining unit employees as of lockout date, and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees

PLAZA FIBERGLAS MANUFACTURING LIMITED AND PLAZA ELECTRO-PLATING LTD., CITCOR MANUFACTURING LTD., AND SABINA CITRON; RE U.S.W.A.

192

0565-89-R; 0891-89-U United Steelworkers of America, Applicant v. **Blue Bell Canada Incorporated**, Respondent v. Group of Employees, Objectors; United Steelworkers of America, Complainant v. Blue Bell Canada Incorporated, Respondent

Certification - Petition - Employees reasonably believing petitioners were meeting with owner - Employees believing owner had threatened plant closure if union organizing successful - Statements by petitioners leading employees to believe unionization would result in loss of benefits - Board unable to accept petition as voluntary expression of employee wishes - Certificate issuing

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *R. W. Pirrie* and *R. R. Montague*.

APPEARANCES: *P. Turtle* and *R. Lemoine* for the applicant; *George Rontiris*, *Carole Piette* and *Bob Tremblay* for the respondent; *Geoffrey A. Howard* for the objectors.

DECISION OF THE BOARD; February 21, 1990

1. The name of the respondent is amended to read: "Blue Bell Canada Incorporated".
2. File No. 0565-89-R is an application for certification in which representatives of the parties met with a Board Officer prior to the hearing and reached agreement on all matters relevant to the application with the exception of the issues described below.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in the Town of Renfrew, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, mechanics, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. In support of its application for certification, the applicant (also referred to in this decision as the "Union" and the "U.S.W.A.") filed documentary evidence of membership in the form of cards, which each consist of a combination application for membership and an attached receipt. The Union filed 101 such cards, 96 of which coincide with the names of employees who are undisputedly included in the bargaining unit for purposes of the count. It is common ground among the parties that 152 of the 153 persons whose names appear on the list filed by the respondent (as amended at the aforementioned meeting with a Board Officer) are properly included on that list for purposes of the count. However, there is a dispute among the parties regarding the status of Winnifred Pasco, who is the other person named on the list. It is the Union's position that Ms. Pasco was not an employee at the time of the application because she exercised managerial functions. The respondent (also referred to in this decision as the "Company") and the objectors contend that she has never exercised managerial functions, and that she should be included in the bargaining unit. Regardless of whether Ms. Pasco is included or excluded, it is clear that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 12, 1989, the terminal date fixed for this application and the date which the Board has determined, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

6. That level of membership support would generally place the Union in a position to obtain a certificate without a representation vote. However, the objectors have filed with the Board a five-page statement of desire (referred to in this decision as the "petition") containing a total of 85 signatures, including the signatures of 38 persons who earlier signed membership cards. Thus, the petition is of potential relevance to the exercise of the Board's discretion under section 7(2) because if it is found to be voluntary, it would raise sufficient doubt concerning the continued support for certification of the applicant by enough employees who also signed membership cards that the Board would exercise its discretion under section 7(2) to direct that a representation vote be taken despite the fact that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant at the relevant time. In addition to its documentary evidence of membership, the Union also filed with the Board counter-petitions revoking support for any petition and re-affirming support for certification of the Union. However, since only 10 of the counter-petitions' 48 signatories also signed the petition, it is unnecessary for the Board to determine the validity of the counter-petitions as they are numerically irrelevant to the disposition of this application.

7. File No. 0891-89-U is a complaint under section 89 of the Act. After hearing and recessing to consider the submissions of counsel with respect to whether that complaint should be heard together with the Union's certification application, the Board made the following oral ruling on July 13, 1989:

Having regard to all of the circumstances and the submissions of counsel, we have decided to proceed to hear the evidence of the parties concerning the voluntariness of the petition.... If after the certification application has been decided by the Board it remains necessary for the section 89 complaint to be adjudicated, it will be heard by this panel and, as agreed by counsel, the evidence which we have heard in the certification application will be applied to the section 89 complaint.

8. During the nine days that were devoted to hearing evidence and argument regarding the petition, nine persons were called as witnesses. In addition to their testimony and the documentary evidence described above, the Board has before it seven exhibits which were entered during the course of these proceedings. In making the findings and reaching the conclusions set forth in this decision, the Board has carefully considered all of that oral and documentary evidence, the submissions of counsel, and such factors as the firmness of the witnesses' respective memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence, and their demeanour. We have also assessed what is most probable in the circumstances of the case, and considered what inferences may reasonably be drawn from the totality of the evidence.

9. The petition was circulated by Winnifred Pasco, Bonnie Beach, Shirley Beach, and Heather Beach (who, for ease of exposition, will be referred to as the "petitioners"). This was the second petition circulated by those four persons during the spring of 1989 in response to attempts to unionize the Company's plant in Renfrew, at which it manufactures denim and corduroy garments. In late April and early May they circulated a petition (the "previous petition") in response to an application for certification filed by the Amalgamated Clothing and Textile Workers Union (the "A.C.T.W.U.").

10. Ms. Pasco, whose brother is the respondent's Shipping Room Manager, has worked for the Company for over twenty-five years. Only one other person in the respondent's work force has more years of service with the Company. Ms. Pasco served as an acting supervisor from April 3 to

April 28, 1989, during the absence of Linda Norlock, a member of management who supervises a number of the respondent's sewing machine operators. Ms. Pasco also served as an acting supervisor from February 6 to 10 and March 27 to 31, 1989, and from April 6 to August 21, 1987. Many other employees have also served as acting supervisors from time to time, but none of them has done so as often as Ms. Pasco. Moreover, although the evidence falls short of establishing that Ms. Pasco regularly exercised managerial functions while serving as an acting supervisor, it does indicate that she interviewed some employment applicants and, at the request of Vera Drefke, the respondent's Sewing Room Manager, telephoned at least one of them to notify her that she had been hired. The evidence further indicates that, unlike other workers who have served as acting supervisors, Ms. Pasco has had some involvement in disciplinary matters. While Ms. Norlock was away, Ms. Pasco was responsible for bringing to the attention of certain employees disciplinary notations prepared by Ms. Norlock. When an employee angrily refused to follow Ms. Pasco's instructions about fixing rejects and stated that she was going home, Ms. Pasco told her that if she left she would not be permitted to come back. After uttering some obscenities at Ms. Pasco, the employee left the plant. It is unclear whether that individual ever attempted to return to work. However, it is clear that at least some employees perceived Ms. Pasco as having discharged her.

11. While serving as an acting supervisor, Ms. Pasco had frequent contact with Bob Tremblay, the Company's Division Manager who runs the Company's Renfrew plant. Mr. Tremblay told the Board that during the period in the spring of 1989 when she was acting supervisor, Ms. Pasco spoke with him three to five times a day. She also accompanied him and the Company's supervisors on their daily walks through the plant. Although Ms. Pasco told the Board that she did not recall doing so, we accept the testimony of Joan McNulty that while Ms. Pasco was an acting supervisor during the spring of 1989, she told Ms. McNulty in the presence of three other employees that unionization of the plant would result in a loss of benefits. We also accept Ms. McNulty's evidence that Ms. Pasco subsequently told her that if a union came in, the Company would padlock the premises and move the machines to a plant in Dallas.

12. The previous petition contained a total of 69 signatures. In dealing with the A.C.T.-W.U.'s application for certification, the Board was not called upon to determine the voluntariness of that document as the A.C.T.W.U. agreed to the taking of a representation vote. (See *Blue Bell Canada Incorporated*, [1989] OLRB Rep. May 412, at paragraph 7.) When the vote was conducted on May 26, 1989, 39 ballots were cast in favour of the A.C.T.W.U. and 109 were cast against it.

13. On the day of that vote, the petitioners met with Mr. Tremblay immediately after work at his request. At the time of that meeting, Mr. Tremblay, the petitioners, and virtually everyone else who worked for the Company knew that the U.S.W.A. had been conducting an organizing campaign and was "waiting in the wings" to apply for certification. (Indeed, the evidence indicates that a number of employees who signed A.C.T.W.U. cards before becoming supporters of the U.S.W.A. signed the previous petition at the suggestion of a U.S.W.A. organizer, in order to trigger a representation vote in the A.C.T.W.U. certification application.) In explaining to the Board why he called that meeting, Mr. Tremblay said: "Even though we'd had a fairly positive vote ... we were still trying to grasp the mood on the floor and figure out what we could do to improve it.... Since the petitioners had come into contact with so many people, I felt that they could give me some insight that we already didn't have into what the concerns were on the floor." That meeting lasted for about an hour or an hour and a half, during which the petitioners detailed workers' concerns about unfair and unequal treatment.

14. The U.S.W.A. filed the instant application on May 30, 1989. Notice of the application was sent to the respondent on June 2, 1989, along with the other materials normally provided by the Board to respondents in certification applications. The respondent posted the Board's Form 6

Notice to Employees of Application for Certification and of Hearing (the "green sheet") on Tuesday June 6 at 9:00 a.m. On Monday June 5, the petitioners were paged over the plant's public address system. When they answered the page they were advised that Mike Silver wished to meet with them. Mr. Silver is one of the owners of Western Glove Works, which acquired the Company in October of 1988 from its previous owner, Vanity Fair. Mr. Silver attended at the plant in August of 1988 to announce his firm's intention to purchase the Company. He also visited the plant on a few other occasions, but his presence was relatively rare. The meeting on June 5 lasted for about fifteen or twenty minutes. During that meeting Mr. Silver asked the petitioners if employee morale had improved. It is unclear what else was discussed at that meeting as the petitioners' evidence about it was quite vague and Mr. Silver was not called as a witness.

15. Although no mention was made of Mr. Silver when the petitioners were paged, some employees may well have surmised that the petitioners were being paged to meet with him. In her testimony, Bonnie Beach stated that she and the other petitioners were requested over the public address system to report to personnel or the test room. She then went on to describe the situation as follows: "Basically Mike Silver was on the floor that afternoon and when we disappeared, he disappeared off the floor. When we came back he did another walk through. It may be that people surmised that we were in a meeting with Mike Silver...." In any event, it may reasonably be inferred that if employees were not initially aware of that meeting, most if not all of them had become aware of it by the time the petitioners began circulating their petition in respect of this application.

16. Jane Latendresse, who was one of the four witnesses called by the Union in these proceedings, described in the following words what happened after that meeting: "Bonnie was working on my line at that time. She came out from the meeting and sat down at [her sewing machine]. She looked like she was pretty worked up - upset. She was talking to Rita Donahue. Then I was called down where she was sitting and she said, 'You're not going to believe what Mike Silver just told us!' I said, 'What?' She said, 'He told us that he was going to shut the doors if the union comes in.' I said, 'Well I don't believe you.' Then she said, 'I wouldn't lie about something like that. Go ahead and ask him for yourself.'"

17. Bonnie Beach's version of that conversation is somewhat different. She told the Board: "I believe [Jane Latendresse] came up and asked me where we had gone. I said we had a meeting with Mike Silver. Then I said that rumour has it that Mike Silver was supposed to have said that the plant was closing.... She said, 'I don't believe it.' I said, 'Well ask Mike Silver.'"

18. It is unnecessary for purposes of this decision to decide which of those two versions is the most accurate. It is clear from the totality of the evidence that, whether intentionally or unintentionally, Ms. Beach left Ms. Latendresse with the impression that Mr. Silver had indicated that the plant would be closed if it became unionized. Following that conversation, Ms. Latendresse attempted to speak with Mr. Silver but was unable to do so as he had already left the plant. When she spoke with Mr. Tremblay the next day to ask him if it was true that the plant would be closed if the union came in, his response did not allay her concerns. He simply told her that "the bottom line was profit", and that the door would be shut if the Company did not make a profit.

19. Several of the witnesses who testified in these proceedings commented on how quickly and pervasively information and rumours generally spread throughout the plant. For example, Shirley Beach noted that "talk really spreads fast in a factory", and Ms. Pasco told the Board that "with the size of the plant, when one [person] knows something, everybody seems to know the same thing". Having regard to all of the evidence, we are satisfied that Ms. Latendresse's understanding of what Mr. Silver had said to the petitioners quickly became common knowledge among employ-

ees, as did Ms. Pasco's statement, which was echoed by at least one of the other petitioners, that unionization of the plant would result in a loss of benefits. We are also satisfied on the totality of the evidence that at least some of the respondent's employees concluded that the petitioners met with Mr. Silver on the day before the green sheet was posted in order to discuss circulation of a petition. In this regard, it is unnecessary to determine whether or not that matter was in fact discussed at that meeting, just as it is unnecessary to determine whether or not Mr. Silver actually stated that he would close the plant if the union came in.

20. The legal basis and effect of petitions was described by the Board as follows in *Brian Chevrolet Oldsmobile Ltd.*, [1989] OLRB Rep. Apr. 324:

9. The system of certification prescribed in Ontario by the *Labour Relations Act* rests primarily upon an assessment of the union's membership support based upon an examination of its documentary evidence of membership. Upon showing the requisite membership support, the union is "certified" or granted a licence to bargain on behalf of a group of employees - subject, of course, to their right to file a timely application terminating bargaining rights. The Board does not solicit *viva voce* opinions about trade union representation (see Rule 73(2) which prohibits that), nor, in this jurisdiction, is a representation vote the primary vehicle for achieving the right to represent employees. That right depends upon the solicitation of a sufficient number of membership cards authorizing the union to act as bargaining agent. To protect employees from possible employer reprisals the anonymity of the union supporters is preserved (see section 111 of the Act).

10. This process has been in place for more than thirty years, and doubts about how the Board should go about its task have frequently been resolved by amending the statute (as, for example, to resolve the question of what is a "union member" and the "question" the Board was to ask itself in this regard which prompted section 1(1)(l)). Indeed there is now an elaborate statutory and regulatory framework governing union membership evidence, as the Board has sought to apply sections 1(1)(l) and 103(2)(j) to the special circumstances of particular cases - as, for example, where the one dollar payment is loaned to a potential union supporter, or where the card is not properly witnessed, or where the card is valid on its face but has been obtained through misrepresentation or intimidation, or where there is a problem respecting one or a few membership documents but not the others, etc. Representation votes are a residual mechanism resorted to where the union cannot demonstrate the support of a "clear majority" (i.e., more than fifty-five per cent) based upon "untainted" membership cards, or where, in the Board's discretion, a representation vote should be held in the particular circumstances of a case. One of those circumstances is a timely and voluntary change of heart by employees who have previously signed union membership cards.

11. Neither the Legislature nor the Board has taken a myopic view of the realities of the situation. Employees can and do change their minds. They may voluntarily sign a membership card one day, but later wish to reconsider their support for collective bargaining. In some jurisdictions the statute precludes or inhibits such expressions so that certification is based solely on membership cards. In others such expressions are irrelevant because the preferred method of testing employee wishes is a representation vote. Ontario has evolved a middle position recognizing the validity of union membership cards, but retaining some flexibility to seek the confirmatory evidence of a representation vote where employees have put before the Board a timely "petition" or other document indicating a change of heart. Petitions too have been part of the certification process for decades.

12. The Board recognizes that "statements of desire" (see Form 6), usually in the form of a "petition", are not regulated by the Act as directly or precisely as union membership evidence. There is no statutory definition equivalent to section 1(1)(l), nor is there any requirement for a monetary payment, in the nature of consideration, confirming the act of signing. There is no statutory declaration similar to Form 9 attesting to the regularity and sufficiency of the membership evidence. There is usually no confirmatory signature of a subscribing witness. Nevertheless, the existence of such statements appears to be contemplated by section 103(2)(j) of the Act and Rule 73 of the Rules of Practice; and in any event, as we have already noted, the Board has a

long-established practice of accepting such petitions and exercising its discretion to order a representation vote where:

- (1) the petition is voluntary (as evidenced by testimony adduced in accordance with Rule 73 of the Rules of Practice), and
- (2) the petition contains the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt whether these "members" (in accordance with section 1(1)(l)) continue to support certification.

13. The Board must be satisfied, however, that when these union supporters sign the petition indicating an apparent change of heart, they are doing so voluntarily, and are not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer, or could result in reprisals. It must be clear that the circulation of the petition is free from the actual or perceived influence of management.

21. Reference may also usefully be made to *Morgan Adhesives of Canada Limited*, [1975] OLRB Rep. Nov. 813, in which the Board wrote:

28. There is a natural suspicion which attaches to a statement of desire following closely upon a union organization campaign. The Board must assure itself that the "change of heart" indicated by employees who sign the petition in opposition to the union after having indicated support for that same union, is a free choice unimpeded by overt or subtle pressures. The rationale giving rise to this suspicion is well summarized in the *Pigott Motors* (1961) Ltd. case, 63 CLLC 16, para. 16,264 where the Board stated:

"...In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. *It is precisely for this reason* and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories." (emphasis added).

As noted in *Peacock Lumber Limited*, [1979] OLRB Rep. May 423, at paragraph 8, in view of the sensitive nature of the employment relationship, "the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it." See also *Lo Food Division of Lumsden Brothers Limited*, [1983] OLRB Rep. May 676; *Schenker of Canada Limited*, [1982] OLRB Rep. June 937; *Catfish Calhoun Inc.*, [1981] OLRB Rep. Nov. 1551; *Westgate Nursing Home Inc.*, [1981] OLRB Rep. June 810; *Fibre Therm Corp.*, [1980] OLRB Rep. Aug. 1196; and *Dad's Cookies Ltd.*, [1976] OLRB Rep. Sept. 545.

22. In the instant case, the petitioners prepared and circulated their petition with the benefit of legal advice. All of the signatures were obtained at employees' homes and other locations away from the plant. Notes were made of the locations at which the employees signed the petition, and of the specific petitioners who witnessed their signatures. However, although we find the petitioners' evidence concerning the origination and circulation of the petition to be fairly reliable, we

are not satisfied on the balance of probabilities that in the circumstances of this case the petition represents a voluntary statement of desire on the part of those who signed it. In reaching this conclusion we have taken into account all of the material facts, including the fact that the petitioners met with one of the owners on the afternoon before the green sheet was posted, after which employees came to believe that he had indicated that the plant would be closed if the union came in. Statements by the petitioners including Ms. Pasco, who was perceived by at least some employees to exercise managerial functions and to have a closer relationship with management than most other workers, also led employees to believe that unionization would lead to a loss of existing benefits. Under the circumstances, it is probable that at least some of the signatories to the petition signed it because they feared that the plant would be closed, or that some of their existing benefits would be lost, if the Union's certification application succeeded, or because they suspected that management would become aware through Ms. Pasco of a refusal on their part to sign the petition. In this regard we note that although some employees signed the petition in Ms. Pasco's absence, it is clear from the evidence that it was common knowledge in the plant that the four petitioners had circulated the previous petition, and were all involved in circulating the petition in respect of the U.S.W.A.'s application. Moreover, Ms. Pasco personally witnessed over forty of the signatures on the petition.

23. During argument, counsel for the Union advised the Board that, although her client is opposed as a matter of principle to the approach set forth in *Robin Hood Multifoods*, [1985] OLRB Rep. July 1159 (because the U.S.W.A. is of the view that it protracts collective bargaining and makes it more difficult for a union to achieve a first contract), in the circumstances of this case (in which at the time of the application Ms. Pasco had ceased to be an acting supervisor and had returned to her job as a sewing machine operator) the Union was prepared to accept the issuance of a final certificate and to make an application under section 106(2) of the Act if it subsequently became necessary to do so.

24. As indicated above, the Board is satisfied on the basis of all the evidence before it that, irrespective of the status of Ms. Pasco, more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 12, 1989, the terminal date fixed for this application and the date which the Board has determined under section 103(2)(j), to be the time for the purpose of ascertaining membership evidence under section 7(1) of the Act.

25. Since there are no circumstances present in this case which would warrant the exercise of the Board's discretion under section 7(2) of the Act to direct that a representation vote be taken, a certificate will issue to the applicant for the bargaining unit described in paragraph 4 of this decision.

26. The complaint in File No. 0891-89-U is hereby adjourned *sine die* for a period not exceeding one year. Unless within that time the complainant or the respondent requests that the Board proceed with the matter, it will be terminated. If such a request is made, the complaint will be scheduled for hearing before this panel of the Board.

2092-89-U John Brodhagen, Complainant v. Teamsters Local Union 938, Respondent v. C.T. Transport, Division of McKinlay Transport Ltd., Intervener

Constitutional Law - Duty of Fair Representation - Agreed facts indicating employer engaged in interprovincial trucking - Business subject to *Canada Labour Code* and not *Labour Relations Act* - Board having no jurisdiction - Complaint dismissed

BEFORE: *Michael Bendel*, Vice-Chair.

APPEARANCES: *John Brodhagen* for the complainant; *Linda Huebscher* and *Ken Hoskings* for the respondent; *Mona V. Anis* and *Michael Davies* for the intervener.

DECISION OF THE BOARD; February 9, 1990

1. This is a complaint under section 89 of the *Labour Relations Act*, in which it is alleged that the respondent violated section 68 of the Act. After hearing the parties, I gave a brief oral ruling, dismissing the complaint, and undertook to issue a decision in writing.

2. Both the respondent and the intervener raised a jurisdictional question by way of preliminary objection. They stated that the intervener's business, in which the complainant was employed, was international and interprovincial trucking. As such, they claimed, the Ontario *Labour Relations Act* does not apply to this dispute about the quality of the representation given to the complainant by the respondent.

3. No evidence was presented, but all of the parties admitted certain facts, including the following:

- (a) the intervener, headquartered in Mississauga, Ontario, operated a trucking business in which the complainant was employed;
- (b) the intervener's trucking business performed regular runs into other provinces and into the United States;
- (c) the parties were aware of no certification of the respondent as bargaining agent for the intervener's employees by any labour relations board;
- (d) a Quebec-based local of the Teamsters Union, which was a party to the same collective agreement as the one applicable to the complainant, was certified as bargaining agent for the intervener's employees in Dorval, Quebec, by the Canada Labour Relations Board;
- (e) in 1979, an illegal strike of employees of McKinlay Transport was settled before the Canada Labour Relations Board, without any of the parties challenging that Board's jurisdiction; and
- (f) the current collective agreement, which expires in 1991, was arrived at with the assistance of the conciliation services of the Canada Department of Labour.

4. There is nothing in the facts of this case, in my view, to suggest that the intervener is subject to the Ontario *Labour Relations Act*. The brief description of the intervener's business set

out above would seem to be sufficient for a finding that it is subject to the *Canada Labour Code*. The parties have conducted their affairs on this assumption. In the absence of some evidence or argument on the part of the complainant that would suggest a contrary result, I have no alternative but to dismiss the complaint for lack of jurisdiction.

2895-88-U The Coalition of Laid-off Workers, Ontario, Canada. Hereinafter known as the C.L.W., Complainant v. The National Automobile, Aerospace and Agricultural Implement Workers Union of Canada. Hereinafter known as the C.A.W., Locals 439 and 458 of the C.A.W., Respondents v. Varsity Corporation, Intervener

Duty of Fair Representation - Evidence - Practice and Procedure - Complainants providing insufficient particulars - Board reviewing legal authority and labour relations rationale for provision of sufficient particulars in advance - Board explaining what particulars are and providing examples - Board distinguishing particulars from evidence - Board directing complainants to provide sufficient particulars in writing

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *R. W. Pirrie* and *D. A. Patterson*.

APPEARANCES: *Karl Ellison* and *David Jack* for the applicant; *Len MacLean*, *Jack Tubman*, *Mike Merone* and *Dan Webster Jr.* for the respondent; *C. G. Riggs* and *E. D. Ludlow* for the intervener.

DECISION OF THE BOARD; February 28, 1990

1. The Coalition of Laid-off Workers (the "C.L.W.") is a group that was formed to represent approximately 125 former employees of Massey-Ferguson who were terminated or permanently laid off when several plants were closed by the company. The intervener, Varsity Corporation, was, prior to June, 1986, Massey-Ferguson Limited. On behalf of the individuals named in the complaint, the complainant C.L.W. alleges that the respondents have breached section 50, 52(5), and 68 of the *Labour Relations Act*.

2. During the first several days of this proceeding, the Board made various oral rulings, some of which we set out herewith in writing.

3. The Board ruled that the C.L.W. is not itself an entity that is a proper complainant in this proceeding. It is not an entity that would entitle it, in its own name, to launch and pursue a complaint of the instant nature. Nevertheless, the Board will continue where appropriate to describe the complaint with reference to the C.L.W. as complainant, for ease of reference purposes.

4. The proper complainants are those individuals listed in the initial complaint, and those individuals subsequently added or removed as complainants by various correspondence received by the Board prior to January 30, 1990. Each of those individuals is in his or her own right a proper complainant to this proceeding. Each of them, with the exceptions noted below, has signed an authorization authorizing the C.L.W. to represent him or her in these proceedings. Those authori-

zations are sufficient authority for the C.L.W. to speak on their behalf. Numerous individuals, subsequent to their signing authorizations and being listed as complainants have indicated that they no longer wish the C.L.W. to represent them nor do they wish to be part of this complaint. Those individuals are hereby dropped as complainants. There are three individuals listed as complainants on the complaint form who have not signed authorizations for the C.L.W. to act on their behalf, nor have they in any way indicated that they wish to be part of this complaint. Those three individuals, Stan Pycherek, Steve Raz, and Sylvester Walters, are therefore not part of this complaint and their names will be deleted as complainants.

5. Finally, with respect to the issue of the proper complainants in this proceeding, at the conclusion of the last day of hearing on January 30, 1990, on the agreement of the parties, the Board ruled that five more individuals would be added as complainants to this proceeding. Four of those individuals are listed in a letter from Mr. Ellison dated January 29, 1990, addressed to the Registrar of the Board, and the fifth individual is Victor S. Andino. The Board also ruled, on consent, that no more individuals can or will be added as complainants to this proceeding. Individuals not yet named as complainants cannot now become part of this proceeding. On behalf of the complainants who were added on January 26th or 30th, Mr. Ellison agreed that they would be bound by all of the rulings made by the Board up to that stage of the proceeding, which includes all the rulings reflected in this decision.

6. We turn next to deal with some of the preliminary objections raised by the respondent unions. The Board dismissed the complaint insofar as it sought to rely upon the provisions of section 50 of the *Labour Relations Act*. Section 50 reads as follows:

50. A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

This is not a section which can be breached in the context alleged by the complainants. It is not alleged that the respondents conducted themselves as if no collective agreement existed; rather, the allegation is that particular articles of the agreement were breached by the C.A.W. Section 50 is not addressed to this type of allegation. The Board was therefore satisfied that the complaint ought to be dismissed with respect to section 50 of the Act.

7. Similarly, with respect to section 52(5) of the Act, there was nothing in the complaint which suggested how section 52(5) had been breached or suggested how it might have been breached. Section 52(5) reads as follows:

52. (5) Nothing in this section prevents the revision by mutual consent of the parties at any time of any provision of a collective agreement other than a provision relating to its term of operation.

It was not apparent from the complaint or submissions that section 52(5) could be breached in the context alleged, and the complaint was therefore dismissed in this respect.

8. In dismissing the complaint with respect to sections 50 and 52(5) the Board commented that the Board was not suggesting that the matters complained of could not be raised, only that they did not constitute, even arguably, breaches of sections 50 or 52(5) of the Act.

9. The remaining aspect of this complaint is the allegation that section 68 of the Act has been breached by the respondent unions. Section 68 reads as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in

bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The respondents first argue that the Board is without jurisdiction under section 68 in this complaint on the grounds that the complaint is really a dispute over entitlement to moneys under the *Employment Standards Act*, and the remedies sought are found exclusively under that Act. They submit that the Board has no jurisdiction under the *Employment Standards Act*. The Board dismissed this objection. The case before the Board is an allegation that section 68 of the *Labour Relations Act* has been breached. To resolve this claim will not require the Board to make findings under the *Employment Standards Act* or to exercise any of the jurisdiction given elsewhere under that Act. Rather, section 68 is alleged to have been breached and the Board is to make findings pursuant to its clear and exclusive jurisdiction under section 68. Accordingly, the Board declined to dismiss the complaint on that ground.

10. The respondents next argued that the provisions of section 68 of the Act do not impose any duty upon their conduct in the circumstances. They submitted that the representation by the C.A.W. about which complaint is made was representation solely with respect to the rights of the individual complainants pursuant to the *Employment Standards Act*. The respondents assert that a union is not bound by the duty imposed in section 68 of the Act when it assists employees, or former employees, with respect to their entitlement under the *Employment Standards Act*. The respondents therefore assert, since no duty lies under section 68, there can be no breach and the complaint ought to be dismissed. See *Lopez*, [1989] OLRB Rep. May 464, in this regard. In dismissing this objection, the Board notes that the respondents had indicated they would be objecting to the adequacy of the particulars and that objection remained to be considered. The nature of the complaint appeared, at this early stage, not only to be a complaint with respect to the conduct of the C.A.W. in negotiating for the complainants the sums of moneys under the *Employment Standards Act* they were or should have been entitled to, but as well complaint about the conduct of the C.A.W. in representing the complainants when they were permanently laid off. The duty pursuant to section 68 of the Act does clearly apply in these circumstances.

11. It appeared to be common ground that two groups (at least) of employees received settlements pursuant to claims under the *Employment Standards Act*. One group of employees apparently includes many of the complainants and a settlement was negotiated on their behalf by the CAW. A separate settlement was reached without CAW assistance for 5 former employees, including Hinds and Ellison. The complainants assert, amongst other things, that the settlement amounts obtained by the 5 employees on their own were greater than the amounts the CAW obtained for the individuals in the group it represented. An Award of a Referee appointed under the *Employment Standards Act* was filed on consent with the Board. The respondents submitted that this Award (the Picher Award) was binding on the parties and that the Board ought to apply the principle of *res judicata* and dismiss the instant complaint. The Board is prepared to assume, for purposes of this ruling, that the Picher Award is binding upon the parties before the Board. We assume this, rather than so find, because it is not apparent from the text of that Award that most of the parties before the Board were parties to that proceeding. The Style of Cause of that Award lists only five claimants, and does not identify as parties most of the complainants before us, nor is the C.A.W. listed as a party to that proceeding. Nevertheless, assuming that all parties before us were parties to that proceeding, the question remains of what effect to give, at this stage, to the Picher Award. In that Award, the Referee accepted the settlements reached in those proceedings. The Board will therefore treat as fact that those settlements were accepted by Referee Picher. That fact does not however speak directly to the section 68 issue before us. Reference to and reliance upon the Picher Award does not lead us to dismiss the instant proceeding at this preliminary stage.

We therefore decline to so dismiss, without prejudice to the right of any party to seek to rely upon the Picher Award at any other stage of these proceedings.

12. After delivering these rulings, the Board turned to the question of the adequacy of the particulars, and the request of the respondents that the proceeding be dismissed for want of particulars, or in the alternative, that the complainants be directed to provide further and proper particulars.

13. Rule 72 of the Board's Rules of Procedure provides as follows:

72. (1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

- (a) include in the application or complaint; or
- (b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

(2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

(3) Where a statement in an application or complaint or in any document filed under these Rules in respect of the application or complaint is so indefinite or incomplete as to hamper any person in the preparation of his case, the Board may, upon the request of the person made promptly upon receipt of the application, complaint or document, direct that the information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Board may strike the statement from the application, complaint or document.

(4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

14. Section 8 of the *Statutory Powers Procedure Act* provides that:

8. Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

15. In *Pebra Peterborough Inc.* [1987] OLRB Rep. March 421, the Board commented on the question of particulars:

3. Both Rule 72 of the Board's Rules of Procedure and Section 8 of the *Statutory Powers Procedure Act* require that particulars of allegations of misconduct be given in a timely manner to the party which is alleged to have acted improperly. This requirement is based on both legal and labour relations considerations. The legal consideration is a recognition of the rule of natural justice that a party against whom the allegations of wrongdoing are made must have sufficient notice of them to enable it to know and prepare for the case that it must meet. The labour rela-

tions consideration is that there be no prejudicial delay in the proceedings (see *Trigiani Contracting Ltd.*, [1979] OLRB Rep. Feb. 141). Where an allegation made in any document filed with the Board is not sufficiently particularized, the Board may, when requested, either strike out that allegation or direct that further particulars be provided. Further, evidence of facts or circumstances that have not been included or sufficiently particularized in a document filed with the Board may not be adduced at the hearing of the matter to which they relate except with consent of the Board and then only upon such terms as the Board considers appropriate.

4. On the other hand, the Board's approach to "pleading" is more lenient than that of the courts. Consequently, the Board will not usually strike out an allegation unless it is so lacking in particulars or so untimely that the party whose conduct is being complained of is so prejudiced that the allegation cannot properly be entertained in light of the legal and labour relations foundation for the requirement of particulars. In the Board's view it was not appropriate to strike out any of the allegations in the intervention or subsequent correspondence. However, we did agree that further particulars were required.

5. In considering the sufficiency of allegations, the Board considers whether or not they substantially identify the offences alleged and the acts or omissions complained of; whether the information requested is really required by the party requesting it; the knowledge or availability of knowledge possessed by the parties of the alleged improprieties; whether what is being requested is really evidence rather than particulars (though particulars may reveal evidence or names of witnesses); the apparent purpose for the demand for particulars; and, the general nature and circumstances of the improprieties alleged....

16. And in *Gallant Painting* [1987] OLRB Rep. March 367, the Board wrote as follows:

8. There is no doubt that the applicant has not had sufficient notice of the improprieties that it is alleged to have committed. Section 72 of the Board's Rules of Procedure has a two-fold purpose and is based on both legal and industrial relations considerations. The legal consideration (which is also present in section 8 of the *Statutory Powers Procedure Act*) is a recognition of the rule of natural justice that anyone charged with wrongdoing should have reasonable notice of the charge made against him. The labour relations consideration is a recognition of the prejudicial effect of delay on a trade union's application for certification. Section 72 seeks to balance natural justice and the avoidance of delay in proceedings before the Board. In an application for certification it is essential that allegations of wrongdoing be made in a timely manner and with sufficient particularity so that an applicant trade union is not prejudiced either by surprise of by being forced to seek an adjournment, thereby delaying its own application (see *Trigiani Contracting Ltd.*, [1979] OLRB Rep. Feb. 141). Persons involved in proceedings before the Board have a right to appear before it with or without counsel. The Board recognizes the difficulties that persons who choose to appear without counsel may encounter and normally affords such persons a somewhat greater latitude in the manner in which they conduct their cases. However, though proceedings before the Board are less formal than those in a court of law, they are nevertheless legal proceedings which are governed by the Board's Rules and Procedures and by the rules of fairness and natural justice. Those who choose to participate in proceedings before the Board without obtaining counsel or other assistance do so at their peril. The law and the rules applicable to proceedings before the Board apply equally to all parties, whether or not they choose to retain counsel. Choosing to neither retain counsel nor otherwise inform oneself does not relieve a party of the obligation to conduct itself in accordance with the rules. Ignorance of the law excuses no one from his obligations under it. ...

17. The complainants indicated they were unwilling to provide particulars, largely on the basis that to do so, they felt, would be to disclose their evidence and their case to the respondents prior to the hearing. In one of the letters filed on behalf of the complainants, Mr. Ellison wrote that the necessary information would be provided through evidence at the hearing.

18. There is a difference between particulars, which we are here concerned with, and the evidence that a party intends to lead at the hearing. The particulars consist of the material (or significant) facts which a party will rely upon as constituting improper conduct under the *Labour Relations Act*. They are the material facts which a party alleges are true and which a party intends

to seek to prove at the hearing. Not every fact will be material. For example, the colour of the hat an individual was wearing on a given day is not likely to be material or significant. In contrast, statements that an individual made to one of the parties, which statements are alleged to constitute unfair labour practices, would be material facts. To take another example, if conduct is alleged to be in breach of a section of the Act, facts describing the conduct in question would be material facts. A party against whom or against which allegations of impropriety are made in a Board proceeding (allegations of impropriety are made against the respondents) is entitled by law to be provided with a recital of the facts alleged to constitute that misconduct before the hearing commences. That party is entitled by law to be advised of these material facts, otherwise called the particulars, which the complainants allege have occurred. Disclosing particulars prior to the hearing will indeed notify the respondents of the material facts asserted against them. This is the very purpose of providing particulars.

19. Disclosure of the material facts in advance of the hearing is not the same as disclosure of the evidence. The material facts will describe the conduct in question, the acts or omissions said to be breaches of the Act. The evidence is how the complainants will attempt to prove these facts during the hearing. They may call as a witness the person alleged to have committed the improper acts and have this person directly testify about the significant events. They may call witnesses to testify who observed the acts, but did not themselves commit the improprieties. They may seek to rely on documents which somehow indicate that the acts occurred. These are only examples. There are various ways in which most material facts can be proved at a hearing. How those facts will be proved is a question of the evidence. A party is not required to disclose what its evidence will be in advance of the hearing. It is not therefore required to state (absent a Board order) who its witnesses will be, what documents it will lead in evidence, or what its witnesses will say when they testify.

20. In the instant proceeding, we were satisfied that sufficient particulars had not been provided. Although the particulars were requested in a timely fashion by the respondents, and although the complainants declined to provide them, we nevertheless decline to dismiss this proceeding. This is not a certification application or other application where the passage of time will create irreparable prejudice. The events in question appear to have taken place some time ago, and the more appropriate response in our view is to direct that sufficient particulars now be provided.

21. The complainants are hereby directed to set down in writing all the material facts upon which the complainants intend to rely in this proceeding. Without leave of the Board panel hearing this case, the complainants will not be allowed to introduce or lead evidence of any material fact or material matter which has not been set out in this written document. Rule 72(4) imposes this condition, which we repeat and affirm here to ensure there is no misunderstanding. The complainants should assume that they will not be allowed to lead evidence of material facts not so set out in this document.

22. We can provide some examples of what would constitute particulars, and which must therefore be provided. If the complainants allege that the C.A.W. or the relevant locals did not represent them properly in some respects, the complainants must set out in writing each and every such example of where they claim the C.A.W. (or the respondent locals) failed to represent them properly. Those examples must describe what the respondent did, or failed to do, that constituted breaches of section 68 of the Act. If the complainants are alleging that certain statements made to them were misrepresentations and breaches of section 68, they must set out the statements made, who made them, when they were made, and to whom they were made. If the complainants suggest that various provisions of the collective agreement were not followed by the respondents, they

must set out the provisions in question or refer to the particular Article together with the material facts which the complainants argue would indicate that the respondents did not comply with the provisions in question. In summary, in documenting the facts that the complainants feel are material to this proceeding, they should be guided by the principle that they should set down any significant fact which they may want the Board to hear evidence of and rely upon in order to decide this case. The particulars should also clearly identify the particular actions, omissions, or acts of any sort by any of the respondents or their officials, agents or officers which the complainants allege constitute breaches of section 68 of the Act. In this respect, the complainants should identify the individuals by name that they claim did something that breached section 68, and the specific actions that any of the individuals might have done, or ought to have done. They should also indicate which complainants have suffered as a result of such actions and in what respect. Included in this requirement, the particulars should note how the respondents breached section 68 with respect to Mr. Hinds and Mr. Ellison, and how they have suffered some injury or harm as a result.

23. For each complainant, the particulars should indicate the key aspects of the employment history of that individual; the date they started work, the bargaining unit they were in, and the dates and circumstances under which they ceased to work for the employer. The particulars should also indicate which complainants signed an authorization for the C.A.W. to act on their behalf, or otherwise authorized the C.A.W., which complainants were covered by the settlement which the C.A.W. negotiated, and the amounts each complainant received from that settlement.

24. We note that the respondents have indicated they will argue that the Board ought to decline to inquire into this matter on the grounds of delay; that is, the events alleged to have breached section 68 occurred so long before the instant complaint was filed, the complaint ought to be dismissed without deciding whether section 68 was breached. The particulars therefore should also set out the material facts upon which the complainants intend to rely with respect to what occurred between the events said to have breached the Act (which appear to have occurred before or leading up to March, 1986) and the date that the complaint was filed, February 22, 1989.

25. The particulars directed herein shall be filed with the Board, and served by the complainants upon the other parties, no later than March 30, 1990. Failure to file the particulars by that date will result in the complaint being dealt with solely on the basis of the particulars already filed. This may well lead to dismissal of the complaint without inquiring into the merits.

26. Should any of the other parties have a dispute with respect to the sufficiency of these further particulars, they shall file with the Board, and serve upon the other parties, written submissions in that respect no later than April 13, 1990. Any such submissions should specify the precise information which a party claims must still be particularized together with all submissions a party wishes to make in support of its objection.

27. Our directions in this regard, and our prior rulings, are without prejudice to the right of the respondents or the intervener to raise an objection already dealt with, to the extent that the further particulars materially affect the prior objections or rulings.

28. The Board has still to consider certain objections not yet dealt with, including the argument that the particulars disclose no *prima facie* case, and that the complaint ought to be dismissed on the grounds of timeliness or delay. All parties should be prepared to deal with these matters, and any other matter relevant to the proceeding, at the next hearing day.

29. This matter is adjourned, on the basis described above, to be scheduled before the instant panel for two further hearing days, not earlier than April 20, 1990, in consultation with the

parties. The parties are all agreed that such consultation should take place, and they are further agreed that the two days should be scheduled close together, but not consecutively.

30. This matter is referred to the Registrar.

0729-86-U; 0759-86-OH; 2239-86-U The Electrical Power Systems Construction Association, Ontario Hydro and Gilbert Steel Limited, Applicants v. International Association of Bridge, Structural and Ornamental Iron Workers Local 721, George Joncas, Alfie Thomas, and Aaron Murphy, on their own behalf and on behalf of the respondent union, Respondents; International Association of Bridge, Structural & Ornamental Iron Workers, Local 721, on Behalf of its Reinforcing Rodmen Named in Schedule "B" to the complaint, Complainants v. **Gilbert Steel Limited**, Respondent v. The Electrical Power Systems Construction Association, Intervener; The Electrical Power Systems Construction Association and Ontario Hydro and Gilbert Steel Limited, Complainants v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, George Joncas, Alfie Thomas, John Donaldson and Aaron Murphy, Respondents

Construction Industry - Health and Safety - Strike - Unfair Labour Practice - Employer requiring all employees to wear bellyhooks, whether or not needed in work - Employees believing bellyhooks unsafe and refusing to wear as way of demonstrating refusal to use under any circumstances - Employer refusing to assign work to employees refusing to wear bellyhooks - Employer seeking illegal strike declaration and damages - Employees alleging reprisal contrary to *Occupational Health and Safety Act* - Refusal not justified under *Occupational Health and Safety Act* since mere wearing of bellyhooks not alleged to endanger - No refusal to work since no work assigned - Complaints and application dismissed

BEFORE: Harry Freedman, Vice-Chair, and Board Members W. Gibson and J. Kennedy.

APPEARANCES: A. E. Golden, Susan Ursel, R. Avinoam and J. Donaldson for the International Association of Bridge, Structural & Ornamental Iron Workers, Local 721; M. Patrick Moran and Ivars Starsts on behalf of the Electrical Power Systems Construction Association, Gilbert Steel Limited, and Ontario Hydro; Murray Gold on behalf of the International Association of Bridge Structural and Ornamental Iron Workers.

DECISION OF THE BOARD; February 26, 1990

1. There were three proceedings commenced before the Board as a result of the refusal by members of the International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, hereinafter referred to as Local 721, employed as rodmen by Gilbert Steel Limited at the Ontario Hydro Darlington Nuclear Generating Station construction project to wear or use a belly-hook. Board File No. 0729-86-U is an application under section 135 of the *Labour Relations Act* for a declaration and direction; Board File No. 0759-86-OH is a complaint under section 24 of the *Occupational Health and Safety Act* for compensation and Board File No. 2239-86-U is a complaint under section 89 of the *Labour Relations Act*.

2. The hearings in this matter took more than twenty days to complete. The Board heard the oral testimony of sixty-five witnesses and received both documentary and physical evidence. The Board also took a view of the construction project. Following the conclusion of the hearing and while this decision was under reserve, Board Member James Wilson died. The parties were notified and subsequently they all consented to the substitution of Board Member William Gibson for Mr. Wilson.

3. The belly-hook is a tool used by rodmen to attach themselves to the structure that they are building. Its use becomes necessary if there is not a platform on which the rodmen can stand to place and tie reinforcing rods. The belly-hook is worn by the rodmen on their utility or tool belts.

4. The refusal by a number of the rodmen to wear or use their belly-hook began on Friday, June 6, 1986. John Donaldson, the business agent and president of Local 721 visited the job site on that day. That visit was prompted by discussions that had taken place the previous day at a meeting called to ratify a memorandum of agreement that had been reached between the Electrical Power Systems Construction Association (EPSCA) and the International Association of Bridge, Structural and Ornamental Iron Workers. One of the issues in dispute in the negotiations between EPSCA and the International was the use of the belly-hook. The memorandum of agreement called for each party to strike a committee to study the issue. At a point near the end of the ratification meeting, Mr. Donaldson told the members who were present that Charles Dietrich, the superintendent of Gilbert Steel Limited had advised him that the belly-hooks were only used by the rodmen at Darlington one per cent of the time. Some members told Mr. Donaldson that that was untrue and that the belly-hooks were used regularly by rodmen who had to climb walls carrying reinforcing rods to place them at the top of the walls. Mr. Donaldson testified that he told the rodmen at the meeting that they had the right to refuse to perform unsafe work and that they should do so. A suggestion was made to Mr. Donaldson to visit the project to see for himself what work the rodmen were doing using the belly-hook.

5. When Mr. Donaldson went to the job site the next day, he was joined by Aaron Murphy, the business agent for that area. They went to the locations where the rodmen were working and they observed a crew of rodmen climbing up a wall from a scaffold platform carrying reinforcing rods. Mr. Donaldson and Mr. Murphy climbed the scaffold to speak to the crew. Mr. Donaldson told the crew that they had a right to refuse to do that work and that they should do so. Mr. Murphy and Mr. Donaldson then went to several different scaffolds and advised the crews at each of the scaffolds that they had the right to refuse to work using the belly-hook and that they should do so.

6. While walking around the job site, Mr. Donaldson met Mr. Dietrich. Mr. Donaldson and Mr. Dietrich exchanged heated words. Mr. Donaldson had indicated to Mr. Dietrich that his statement about the amount of time the belly-hook was used was not true. Mr. Donaldson then walked away from Mr. Dietrich and continued talking to more rodmen.

7. Later Mr. Donaldson met George Joncas, a Local 721 union steward and the Local's health and safety representative on the job. They attended at Ontario Hydro's offices and went to see Al Jean, the Ontario Hydro Structural Superintendent at Darlington. Mr. Donaldson testified that he discussed the rodmen's use of the belly-hook and the need for another level of scaffolding with Mr. Jean. He and Mr. Jean agreed to meet the following Thursday. After that meeting ended, and as Mr. Donaldson was leaving the Darlington construction site, he received a message from Mr. Jean. Mr. Jean wanted to see Mr. Donaldson immediately. Mr. Donaldson spoke with Mr. Jean again that day. Mr. Donaldson was told by Mr. Jean that he wanted the rodmen to go back to work using the hook until their meeting next Thursday. Mr. Donaldson told Mr. Jean that he

would not ask the rodmen to go back to work using the hook and that Ontario Hydro should build another level on each scaffold.

8. Mr. Donaldson testified that he understood that the rodmen were simply refusing to use the belly-hook and carry reinforcing rod on their arms while climbing. As a result of their refusal to use the belly-hook, work on the vertical walls could not continue for very long. There was however work to be done on horizontal slabs that did not require the use of the belly-hook.

9. In cross-examination, Mr. Donaldson testified that he told the rodmen that using the belly-hook was unsafe and that they should not work with it. Mr. Donaldson had spoken to many rodmen on that Friday, clearly saying to them that the use of the belly-hook was unsafe and that they should no longer use it. It is apparent to us that Mr. Donaldson's visit on Friday started the rodmen's refusal to use and wear the belly-hook which continued on Monday.

10. On Monday June 9, Mr. Dietrich and Guy Morrency, another Gilbert official, walked through the Darlington job site and spoke with several rodmen. They learned that a number of rodmen were refusing to use or wear the belly-hook. As a result, Mr. Dietrich convened a meeting of the rodmen at about 10:00 o'clock that morning. At that meeting, Mr. Dietrich told the rodmen that they were to put their belly-hooks back on their belts and go back to work. He told them that if they refused to wear the belly-hook then they would not be allowed to work.

11. There was a great deal of testimony about what was actually said at that meeting, but the clear message that was conveyed by Mr. Dietrich to the rodmen was that if the rodmen refused to wear the belly-hook on their belts, they would not be permitted to go back to work. The rodmen at the meeting told Mr. Dietrich that they would not wear the belly-hooks any longer.

12. At the conclusion of that meeting, Ron Pearce, a rodmen on the day shift who was also an alternate Local 721 steward called the Local 721 union hall and spoke with Stan Arsenault, a business agent for Local 721. Mr. Pearce told Mr. Arsenault that there was no work available for the rodmen because they were refusing to wear the belly-hook. Mr. Arsenault told Mr. Pearce that the rodmen can refuse to use the hook but they cannot refuse to work and just walk off the job. Mr. Pearce also told Mr. Arsenault that Mr. Dietrich had told the rodmen that if they did not wear the belly-hook, then they may as well go home.

13. At that point, while it is unclear from the evidence as to precisely how it came about, a message was conveyed to the rodmen at the meeting to go to the union hall. No further work was done by the rodmen on their shift that day.

14. That afternoon, the evening shift reported for work, but part way through their shift walked off the job. John MacMillan, the union steward on the afternoon shift testified that he told Mr. Dietrich that the afternoon shift was walking off the job in support of the day shift. Mr. MacMillan had learned that the day shift had refused to wear the belly-hook. He said that everybody on the afternoon shift had agreed to support the rodmen on the day shift.

15. The position of the rodmen and Gilbert Steel did not change until Thursday June 19. Many of the rodmen reported for work each day, but were not permitted to go to work because they refused to wear their belly-hook. The work to be done on the vertical walls required the use of a belly-hook to place the top few bars. There was also work to be done on horizontal slabs which did not require climbing and therefore the belly-hook was not necessary to perform that work. Some rodmen also worked on a service crew doing openings in the walls. Those rodmen also did not need to use the belly-hook to perform their work. Nevertheless, Gilbert Steel required the rodmen to wear their belly-hooks before they were permitted to go to work, regardless of the work

that they were assigned to perform. All of the rodmen refused to wear the hooks on their belts. There were some rodmen assigned to the service crews who did in fact continue working after Monday June 9 even though they did not wear their belly-hooks. We did not receive any explanation as to why some rodmen were permitted to continue working while others were not.

16. During that period of time, a Ministry of Labour inspector had visited the work site. His report indicated that there was no violation of the *Occupational Health and Safety Act*. A demonstration of the work rodmen did on the vertical walls was also carried out under the auspices of the Occupational Health and Safety Branch of the Ministry of Labour on Wednesday June 11 in order to assess the nature of the work that was carried out by rodmen on the walls. That report was issued on June 13 and indicated in essence that an infrequent use of the belly-hook did not constitute a safety hazard.

17. Although Mr. Donaldson testified the rodmen did not think very much of that report, the rodmen who testified at the hearing indicated that they were not aware of the report or its conclusions. Mr. Donaldson explained that he provided a copy of that report to Mr. Murphy who was to circulate it among the rodmen. Mr. Donaldson said that he learned of the rodmen's reaction to that report from Mr. Murphy and other union officials. Mr. Murphy did not testify and there was no direct evidence indicating that the rodmen who refused to wear the belly-hook had been informed of the report or the results of the Ministry of Labour's investigation.

18. On Thursday June 12, after the investigation and demonstration, but prior to the issuance of the report, Mr. Donaldson, Mr. Murphy, Mr. Joncas and Alfie Thomas, the rodmen steward at the work site met with Mr. Jean, Mr. Dietrich and other Ontario Hydro officials. Mr. Jean requested that the rodmen work with the belly-hooks as before. Mr. Donaldson said that they would not do so. Mr. Donaldson told Mr. Jean that it was necessary to have another level scaffold added before the rodmen would go back to work.

19. During that first week, the rodmen gathered at the Darlington site each day to await their work assignment. They were there approximately two hours each day and then left after being advised that they could not work unless they wore their belly-hooks.

20. The application under section 135 had been filed during that first week and was scheduled for hearing on Monday June 16. On that day many of the rodmen who had reported for work at Darlington attended at the hearing before the Board. The hearing did not proceed and Ontario Hydro, Gilbert Steel Limited, the Iron Workers International and Mr. Donaldson met throughout that day and over the next several days in an attempt to resolve the impasse concerning the use of the belly-hook.

21. Ultimately, on Thursday June 19 with assistance of several senior officials from the Ministry of Labour, Ontario Hydro and Mr. Donaldson agreed in principle to a resolution which involved the construction of an additional level on the scaffolds in order to minimize, if not eliminate, the need for the use of the belly-hook. Mr. Donaldson and Allen MacIsaac, the Business Manager of Local 721 went to Darlington to meet with the local Ontario Hydro officials to formally negotiate the terms of that agreement. The formal settlement document was signed by Local 721 and Ontario Hydro on June 20. Gilbert Steel Limited and EPSCA were not parties to that agreement. Mr. Donaldson told the rodmen that they could go back to work on that Friday morning and work resumed by them prior to finalizing the agreement.

22. The section 135 application and section 89 complaint allege, among other things, that the actions by Mr. Donaldson and Local 721 constituted calling an unlawful strike and sought damages. The relief sought in the complaint also included a request that the agreement reached

between Ontario Hydro and Local 721 be set aside on the basis that it was an agreement between an employer subject to an accreditation order and a trade union that was not authorized by the accredited employer bargaining agent.

23. Ontario Hydro and Gilbert Steel Limited are bound by an accreditation order in respect of work done by ironworkers in the electrical power systems sector of the construction industry. EPSCA is the accredited employer bargaining agent for Ontario Hydro and Gilbert Steel Limited in respect of that work.

24. Counsel submitted that the arrangement between Local 721 and Ontario Hydro undermined the authority of EPSCA, the accredited bargaining agent for both Ontario Hydro and Gilbert Steel. Counsel argued that the arrangement was a concession made to Local 721 that it could not obtain in bargaining. By permitting the arrangement to stand, the Board would be approving a trade union seeking concessions from an individual employer that might be vulnerable to pressure. Such action would seriously weaken the bargaining power of the accredited employer bargaining agent and encourage a union to avoid or by-pass the employer's bargaining representative. Counsel suggested that the policy of the *Labour Relations Act* as enunciated in section 146 ought to apply in these circumstances.

25. Section 146 of the *Labour Relations Act* prohibits any arrangement other than a provincial agreement that purports to affect employees represented by an affiliated bargaining agent. That section has application only to employers and employees in respect of the industrial, commercial and institutional sector of the construction industry. The case before us does not relate to the industrial, commercial and institutional sector, but rather relates to the electrical power systems sector. It is argued that the same policy should apply to preserve the integrity of bargaining by an accredited employer bargaining agent outside of the industrial, commercial and institutional sector.

26. While that policy may be one that would better serve labour relations, it is not one that is contemplated by the Act outside of the industrial, commercial and institutional sector. Section 131 of the Act provides the statutory support for maintaining the integrity of an accredited employer bargaining agent. Section 131(1) prohibits direct bargaining and the entering into of a collective agreement between an employer represented by an accredited employer bargaining agent and a trade union. Section 131(2) prohibits any agreement or arrangement between an employer represented by an accredited employer bargaining agent and a trade union for the supply of employees during a lawful strike or lock-out. Unlike the province-wide bargaining regime in the industrial, commercial and institutional sector, section 131(3) of the Act permits an employer represented by an accredited employer bargaining agent to attempt to continue operating during a strike or lock-out. Section 131 does not prohibit arrangements between an individual employer and a trade union that do not relate to the supply of employees during a legal strike or lock-out and that do not constitute a collective agreement. There was no suggestion that the discussions between Ontario Hydro and Local 721 constituted bargaining for a collective agreement or that the arrangement was a collective agreement. Therefore, we are satisfied that the arrangement between Local 721 and Ontario Hydro is not prohibited by the *Labour Relations Act* and refuse to declare that arrangement null and void.

27. When the hearings in this matter commenced, counsel for Local 721 sought to have the section 135 application dismissed as an exercise of the Board's discretion to refuse to grant relief. The Board declined to do so at that time since all of these proceedings raised common factual and evidentiary issues. Counsel for Gilbert Steel Limited pointed out that the section 89 complaint and the application under section 135 were virtually identical, with the section 89 complaint seeking damages and the declaration discussed above.

28. When these matters first came on for hearing, the work stoppage had ceased. Although the agreement which resolved the underlying issue was between Ontario Hydro and Local 721 and therefore was not technically binding on either Gilbert Steel or EPSCA, it was apparent that the manner in which the work of the rodmen employed by Gilbert Steel Limited was to be performed was affected by the agreement.

29. The Board has a discretion to refuse to grant relief in an application under section 135. It generally exercises that discretion when the work stoppage has ceased by the time of the hearing where there is no pattern of previous unlawful strike action, where it is unlikely that such illegal strike action will occur in the future, or if the unlawful strike does not have implications beyond the immediate parties. See *Ontario Hydro*, [1985] OLRB Rep. April 577 at 578-579 and the cases cited therein.

30. The Board has also exercised that discretion to refuse to grant relief in a complaint under section 89 of the Act on those same principles where the allegations and relief sought relate to an alleged unlawful strike. See *Steinberg Inc.*, [1982] OLRB Rep. Sept. 1366; application for reconsideration refused [1983] OLRB Rep. Feb. 253.

31. We recognize that the complaint under section 89 of the Act seeks damages. Section 95 of the Act provides the method by which a person or trade union that is not a party to a collective agreement who suffers damage as a result of an illegal strike or lock-out may recover damages. Section 95 may be invoked only where the Board grants a declaration of an unlawful strike or lock-out. In our opinion, it is entirely inappropriate to circumvent the code provided by sections 92, 93 and 95 for relief in respect of an unlawful lock-out or strike by proceeding with a claim for damages in a complaint filed under section 89.

32. We note parenthetically that at the time of the work stoppage, the parties had been bound by a collective agreement which had expired, but no conciliation officer had been appointed. Thus, the relevant grievance and arbitration procedures under the expired collective agreement could have been resorted to in order to seek damages for the alleged unlawful strike. For all of these reasons, the Board hereby exercises its discretion not to grant the relief requested in the section 89 complaint and the section 135 application. Accordingly, that application and complaint are hereby dismissed.

33. There remains for consideration the complaint made by Local 721 on behalf of the rodmen for compensation for the period between June 9 and June 20 when they did not work as a result of Gilbert Steel Limited not assigning them work because they refused to wear their belly-hook.

34. Counsel for Local 721 contended that the issues in this complaint require a determination of whether the failure to provide the necessary scaffolding so as to eliminate the need for working with the belly-hook contravened section 76 of the Regulations under *Occupational Health and Safety Act*, whether the use of the belly-hook was a hazard to an employee's health or safety, and whether the employees who refused to wear the hook had reason to believe that using the belly-hook was likely to endanger themselves or others.

35. During final argument, counsel for Local 721 stated that it did not seek compensation for any rodmen who were not required to use the belly-hook to perform their work. Rodmen on the service crews or who were assigned to work on horizontal slabs did not need to use the belly-hook. We understood that the claim for compensation was therefore being pressed only on behalf of those rodmen who were on crews that were placing reinforcing rods on vertical walls. The origi-

nal complaint was not so limited and the evidence tendered during the hearing suggested that all of the rodmen were seeking compensation.

36. Mr. Donaldson and other officials of Local 721 have had a genuine and sincere concern over the use of the belly-hook for many years prior to June 6. Clinical studies have been done on the work performed by rodmen and on the effect that the use of the belly-hook has on them. Mr. Donaldson and Local 721 have been active in attempting to minimize the rodmen's use of the belly-hook. They have sought the use of scaffolding to provide rodmen with platforms from which to place and tie reinforcing rods on vertical structures. We have no doubt that Mr. Donaldson sees the belly-hook as creating long-term health risks for rodmen and has acted to minimize the use of the belly-hook so as to reduce those risks.

37. The evidence before us indicates that Mr. Donaldson also recognized that in some situations rodmen would need to use the belly-hook and could do so without danger to an employee's health or safety. His objective in the collective bargaining that took place before the work stoppage was to attempt to minimize the use of the belly-hook. Local 721, through the International, had proposed a rotation system for working with the belly-hook and it also proposed that the employer supply the hooks to rodmen without cost. Mr. Donaldson was unsuccessful in securing the agreement of EPSCA to these demands during bargaining. The memorandum of agreement was signed over Mr. Donaldson's objection by the International and EPSCA, the actual parties to the expired collective agreement.

38. After that memorandum of settlement was signed on June 3rd, Mr. Donaldson raised the safety issue with the rodmen at the work site for the first time. While the timing of Mr. Donaldson's conduct certainly caused Gilbert Steel Limited and Ontario Hydro to question his sincerity and motive, we accept that Mr. Donaldson had at all material times a real health and safety concern about the rodmen's use of the belly-hook. Our finding of genuine concern on Mr. Donaldson's part however does not end our inquiry. Mr. Donaldson was not an employee who refused to work using a belly-hook. The rodmen who were employed by Gilbert Steel Limited refused to wear their belly-hook and it is necessary therefore to consider whether their refusal which led to the subsequent decision of Gilbert Steel Limited not to assign work to them was protected by the *Occupational Health and Safety Act*.

39. We do not need to decide whether the scaffolding that had been provided prior to June 6 was adequate or in compliance with the regulations. We simply observe that the evidence of the individual rodmen's concerns about safety did not relate to the scaffolding provided but rather involved wearing and using the belly-hook.

40. We note the work stoppage occurred because Gilbert Steel Limited did not assign rodmen to perform work when the rodmen refused to wear their belly-hook. There was not an actual refusal by the rodmen to perform assigned work. The rodmen's refusal to wear their belly-hook took place when most of them did not actually need to use their belly-hook at the time they decided not to wear it.

41. It appears to us that the issue that must be determined is whether the rodmen who refused to wear the belly-hook did so because they had reason to believe that it would likely endanger themselves or others.

42. The test to be applied in determining whether an employee has reason to believe that work is likely to endanger himself or others was set out by the Board in *The Corporation of the City of Toronto*, [1986] OLRB Dec. 1834 at para. 61-64:

61. We have read, with interest, the various authorities referred to us by counsel and we have carefully considered the argument advanced by Mr. Goldblatt that, under section 23(1) of the *O.H.S.A.*, at the point of the initial work refusal, a worker's "burden of justification" is lower than it is under section 23(6) after the intervention of a health and safety inspector. We are inclined to agree with that proposition. That is the natural implication of the differences in statutory language ("reason to believe" versus "reasonable grounds to believe"), and, as a purely practical matter, the validity of an employee's work refusal is more likely to be substantiated if the inspector agrees with him than if he does not. That is why the Union makes so much of the fact that, eventually, a Ministry inspector did form the opinion that "in some circumstances" the use of the vest might pose a safety hazard. Moreover, even the phrase "burden of justification" must be used with some care because it is clear that, under section 24 of the *O.H.S.A.*, the employer has the legal burden of justifying any action taken against an employee refusing to work.

62. We also agree that the Board should not put an unduly rigid construction on the terms of section 23(1), lest employees be discouraged from raising safety issues of the work place. That would be inconsistent with the scheme of the Act. Section 23 is designed to promote and protect employee prudence, while at the same time, providing a mechanism for resolving legitimate concerns through a process of discussion with the employer, and, if necessary, the assistance of a "neutral" official of the Ministry of Labour. It is both proper and desirable that employees should be able to voice their safety concerns without fear of penalty or reprisals. However, the problem in this case is not the evidentiary threshold that employees must meet under section 23(1) as opposed to section 23(6); but rather whether a concern about their personal safety was the "real reason" that employees were refusing to work on May 19.

63. Counsel for the City points to what he describes as the "collective" or "concerted" nature of the employees' work refusals, and argues that this points inevitably, to the conclusion that they were engaging in an unlawful strike. We would not take the proposition quite that far. We agree that the apparently concerted nature of the employees' conduct may colour the Board's view and lead to inferences about the employees' real motive, however, so long as employees work together in groups and may be confronted with situations that they *individually and collectively* may regard as unsafe, we cannot conclude that a refusal to work was unjustified simply because a number of employees were involved. That proposition was clearly established in *Inco Metals Co.* [1980] O.L.R.B. Reports July 981, where the Board majority had this to say:

55. It is understandable for a company to be concerned that a group of employees, in the guise of invoking safety legislation, might refuse to work for reasons in fact unrelated to their own safety. In irresponsible hands any right can be abused. Moreover, safety issues, like the one in the instant case, can involve technical factors better understood by management. It is therefore not unnatural for a company to sometimes wonder whether a refusal to work by a group of employees is in fact a gesture of strength that is more impetus than cautious and to suspect that it is substantially inspired by other concerns.

56. Another natural concern for any company in the face of the right of employees to refuse unsafe work is the element of surprise. One of the things that a company expects in any collective bargaining setting is a freedom from work stoppages during the life of a collective agreement. The cost to the company both in terms of lost production and expenses incurred to remedy an unsafe condition may come without warning and require an unwelcome departure from established financial planning and a company's own schedule for capital and safety improvements. Moreover, any right of groups of employees to refuse to work because of health and safety concerns over such factors as the location or design of a plant, the choice or design of tools and equipment, the kind of materials used and the overall method of production tends to make negotiable matters previously within the exclusive discretion of management. Given all of these factors it is not unnatural for employers generally to have reservations about the motives for any concerted action in the name of safety (See, generally, *Ison, Occupational Health and Wildcat Strikes, supra*).

57. As valid as those general concerns may be, this Board must not construe the statutory right to refuse unsafe work so narrowly as to unduly discourage its legitimate use.

In fact valid employee complaints can and do arise in a group setting. When employees do share a concern a group response may be natural. And, as the instant case illustrates, different groups, like different individuals, may react differently to the same circumstances. By the very nature of the employment relationship, it often takes courage to confront an employer. It would, therefore, be unduly restrictive and unrealistic to construe the statutory right to refuse unsafe work as being unavailable to employees who share a concern and act with a common purpose.

58. The rights conferred by the Act are not unlimited. Nothing for example, permits employees who are not themselves involved in a perceived safety hazard the right to down their tools out of sympathy for another employee whom they think is confronted with unsafe work. Before any employee can invoke the right to refuse work he must have reasonable grounds to believe that he himself is in jeopardy or that he will place another employee in jeopardy if he proceeds to work. The question must always be whether the employees refusing to work, whether individually or as a group, each have sufficiently close relationship to a perceived hazard that they are themselves in peril or that they will put another employee in peril by performing their work. Moreover, the refusal to work protected by the statute is not a general withholding of services. An employee who protests that working conditions on a particular job are unsafe can't refuse to perform alternative work that isn't unsafe.

59. The requirement that an employee have "reasonable cause to believe" that there is danger imposes an objective standard by which to test the employee's action. The Act does not, by the use of the words "reasonable cause", legislate different standards of protection for the squeamish and the intrepid. Different employees within the same work place may have different views of what constitutes an acceptable risk. Likewise, strangers to a particular trade or industry might view with alarm situations that are not seen as hazardous by the people who work in that field on an every day basis. On a complaint such as this, therefore, in considering whether an employee had reasonable cause to refuse to work in a given situation, this Board must ask itself whether the average employee at the work place, having regard to his general training and experience, would, exercising normal and honest judgement, have reason to believe that the circumstances presented an unacceptable degree of hazard to himself or to another employee.

60. The ability of an employee to invoke the right to refuse work does not depend on whether there is in fact any danger. The question is whether at the time an employee refuses to perform his work he has reasonable cause to believe that it is unsafe to do so. The fact that it may later be shown that there was no real danger at the time an employee refused to work doesn't mean that the employee was wrong in exercising his right under the Act. The events must be assessed in the light of knowledge available at the time that the employee refused to work.

(We should note that *Inco* was decided under the predecessor to the current *O.H.S.A.*, which put a slightly higher obligation on the employee at the "entry level").

64. We agree with those observations, but would add one more: while the Board must be scrupulous in ensuring that employees' rights under the *Occupational Health and Safety Act* are protected, we must also ensure that those rights are not abused, or raised to camouflage illegal strikes. That was a concern frequently raised in the employer community prior to the passage of the *Occupational Health and Safety Act*, and if such abuse became a pattern, it would undermine the legitimacy of the whole regulatory scheme. This is not to say the employees, individually or collectively, must await an accident before protesting about safety problems. Clearly, they are entitled to act if they have reason to believe such problems exist. But, by the same token, the *O.H.S.A.* should not be treated as a convenient pretext, to be invoked in defence of employee protests which do not really involve their personal safety. Collective action in conjunction with other evidence of the employees' motivation may well point to the conclusion that their conduct really does constitute a "strike" rather than a *bona fide* refusal to work because of safety concerns. That is our conclusion in the instant case.

43. The evidence of the rodmen was quite telling in respect of their reasons for refusing to

wear the belly-hook. While the evidence of some of the rodmen referred to safety concerns, much of their evidence suggested that the wearing of the belly-hook was a symbolic gesture to show Gilbert Steel Limited that the rodmen would no longer use the belly-hook. Many rodmen testified that there was a lot of work that could be done without the use of the belly-hook but that Gilbert Steel had made it clear to them that if they did not wear the belly-hook on their belts they would not work. The rodmen refused to wear the hooks on their belts. Gilbert Steel required the rodmen to wear the hooks on their belt. If they refused, they would not be assigned to perform work. There was not a refusal by any of the rodmen to perform work assigned to them by Gilbert Steel Limited.

44. Ray Thompson, a rodman for fourteen years and a crew foreman, testified that he refused to wear the hook for the first time on Tuesday morning, June 10 when all of the rodmen were waiting to see if they could go to work. He said that he took a stand and thought that the time was right to do so. He referred to some safety concerns about using the belly-hook, but said that the opportunity was there to refuse so he did. Mr. Thompson also testified that he had heard from others that Mr. Donaldson had told the rodmen not to use the belly-hook.

45. Don Lapschies, a rodman, testified that he left his hook in his car on Monday June 9. He thought using the hook was dangerous but that this was the first time he had ever refused. He had used the hook in his work as a rodman for the previous seven years. He said that the time was right for a concerted effort not to wear the belly-hook any longer. He also said that he knew that he could refuse unsafe work but had never done so before.

46. Greg O'Connor, a rodman, testified that he refused to wear the belly-hook on the Tuesday morning because it was time to take a stand.

47. Dennis Breton, a rodman, who was assigned to the afternoon shift testified that his union steward, John MacMillan had told him and the other members of his crew that the day shift had taken off their hooks and that they had been sent home. Mr. Breton's crew met in a group and decided not to wear their hooks. Mr. Breton testified that they waited two hours to see if they could work without wearing their hooks. Their foreman, Jack Rainville, told them that they would not be paid if they did not work. After two hours, the crew left the work place as a group.

48. Alfie Thomas, a rodman and shop steward, testified that the rodmen and Mr. Dietrich had an understanding that scaffolds would be built high enough so that the belly-hook would only be used to place the top two or three bars. Mr. Thomas also testified that he was responsible for the demands made in bargaining for work rotations in respect of using the belly-hook. Mr. Thomas was not at the work site on Friday or Monday. On Tuesday morning June 10 he arrived at work and learned at that time that there had been a refusal to wear the hook and as a result, the rodmen were not assigned by Gilbert Steel to go to work. Mr. Thomas said that he had not used his belly-hook because he thought it was a hazard. Mr. Thomas thought that Gilbert Steel had been violating the understanding that had been reached earlier because the rodmen were now being required to use their belly-hook to place the top five or six reinforcing rods.

49. Mr. Thomas also testified that he told the rodmen that they did not need to use the hook to go to work and that he wanted to rotate work that was available without the use of the hook among all of the rodmen. When Mr. Dietrich learned of that plan, he put a stop to it. Mr. Thomas said that Mr. Dietrich told him that it was a management decision about the assignment of work. Mr. Thomas said that Mr. Dietrich had clearly told him that if the rodmen did not wear their belly-hook, they could not work. Mr. Thomas also testified that no one refused to perform work. He said that they would not work with a belly-hook.

50. Jack Rainville, a rodman foreman on the afternoon shift, testified in examination-in-chief that he had never used a belly-hook and had never been asked to use it. He said that Mr. Dietrich and Mr. Morrency had told him that if the rodmen did not wear their belly-hooks there was no work for them. Mr. Rainville said that he suggested to Mr. Dietrich that his men do that work that they could be done without using the hook. Mr. Dietrich said no. In cross-examination, Mr. Rainville conceded that he had used the belly-hook before and as part of the crew would use it on occasion. He said he never before refused to wear the hook or refused to perform work, but because his crew would not work with the hook he had no work to perform. He said that if his crew had agreed to wear the belly-hook he would also wear it.

51. Mike Joly, a rodman on the day shift, testified that he only refused to wear the belly-hook, but did not refuse to do any work between June 6 and June 19. His crew foreman, Amy McFadden told him that if he did not wear the belly-hook, he could not do any work. Mr. Joly had worked as a rodman for seven years and had never refused to use the belly-hook until Mr. Donaldson told him that he could refuse to do unsafe work. Mr. Joly also said that it was time that he and his union brothers took a stand on the issue.

52. Pat Simon, a working foreman on the day shift decided not to wear his belly work after discussing the matter with his crew. He testified that he concluded that it was unsafe to use the belly-hook. While some of the work that he and his crew could do did not require using the hook, he was told by Mr. Morrency that he and his crew could not work unless they wore their hooks on their belts. He asked his crew if they would wear hooks to finish off their work and they refused. Mr. Simon also said that he would back up his crew's refusal to wear the hook by also refusing to wear it.

53. Armand Breton, a rodman on the day shift, was working on horizontal slabs when he was told by Mr. Dietrich that if he did not wear the hook he could not work. Although Mr. Breton said that he felt that the hook was unsafe, the work he was assigned to perform did not require the use of the hook. Mr. Breton testified that the boys got together to take a stand against using the hook. Prior to that refusal, Mr. Breton had always worn the hook on his belt, even though he did not need to use it.

54. Jim Gibson, a rodman on the day shift, testified that Mr. Donaldson had told him and others at the union meeting on Thursday, June 5 that using the hook was unsafe and was breaking the law. Mr. Gibson had been a rodman for twenty years and had used the belly-hook before throughout that time. He testified that he took the hook off on Monday morning June 9 because all of the other rodmen had decided together that they would no longer wear the belly-hook.

55. Bernard Pico, a rodman on the day shift, said he refused to wear the belly-hook because he thought it was hazardous. Mr. Pico said that on Monday June 9 he and the other members of his crew told their foreman, Cy Gibbons that they were not going to use the hook. Mr. Gibbons responded by saying that if they did not wear the belly-hook there was no work for them to do. Mr. Pico testified that there was work available that could have been done without using the belly-hook. Mr. Pico had been a rodman for nine years and had never refused before to use or wear the belly-hook because he could not get all other members of his union together to refuse.

56. Leslie Joy, a rodman working foreman, did not refuse to perform work because he and his crew worked on horizontal slabs. He was told by Gilbert Steel that he had to wear the hook on his belt or there would be no work for him. Mr. Joy said that there was work that could have been done without using the belly-hook, but because the other rodmen on his crew refused to wear the hook so did he.

57. Richard Breton, a rodman on the night shift, testified that he found out about the refusal to use the hook from his brother, Dennis Breton. Mr. Breton testified that all of the guys got together and decided not to wear the hook. His brother had told him that he had spoken with the union stewards and they were backing up the men. Mr. Breton commented that they had to do something about the belly-hook because if they did not get rid of the belly-hook at that time they never would.

58. John Sousa, a day shift rodman, testified that he took off his belly-hook because his foreman, Pat Simon, had told him that the union steward, Alfie Thomas had said to take off the hook. Mr. Sousa also testified that he remembered Mr. Donaldson telling a meeting of rodmen that they should not use the belly-hook.

59. Jeannot Plourde, a day shift rodman, testified that he did not need the hook to do the work to which he was assigned. He said he could have left the hook on his belt and not use it to do his work. He testified that he took the hook off his belt because everyone else had done so. He said that he had heard that the others were told by the union to take off the belly-hook. He said that Mr. Donaldson had told them to be available for work but not to wear the belly-hook. Mr. Plourde also testified that Mr. Donaldson had told them that working with the belly-hook was unsafe.

60. Rejean Gagnon, a day shift rodman, testified that he thought using the belly-hook was unsafe. He explained that Mr. Donaldson had told him and others to be available for work. He said that the group decided not to use the belly-hook any longer. June 9 was the first time in his twenty years as rodman that he refused to use or wear a belly-hook. He also said that if the others had continued to use the hook so would he. Mr. Gagnon had been working on horizontal slabs when Mr. Dietrich had told him and others that unless they wore the belly-hooks on their belts there would be no work for them to do. Mr. Gagnon also knew that if he put his hook back on his back he could go back to work on the horizontal slabs.

61. Gabriel Sousa, a rodman who attended the ratification meeting on Thursday June 5, testified that he decided he would not wear the belly-hook after that meeting because there was an agreement reached at that meeting to no longer wear the belly-hook. He did not wear his hook after that date. Mr. Sousa also testified that he thought the hook was unsafe. At the time of his refusal Mr. Sousa was working on horizontal slabs and did not need to use the hook in order to perform his work.

62. Doug Sands, a day shift rodman, testified that he and others had been told not to refuse work, but to do the work without using a hook. Mr. Sands also said that after the ratification meeting on Thursday there was an agreement not to wear the hook. Mr. Sands said that Mr. Donaldson and Mr. Thomas had told him and others that when they went to work on Monday June 9 to take their hooks off their belts. He testified that they had said that they were going to fight to get rid of the belly-hook.

63. Norman Roussel, a day shift rodman, testified that he was told by Mr. Dietrich that there was no work if he did not wear the hook. He said that everyone decided that they would take their belly-hooks off so he would as well. Mr. Roussel also testified that there was work that was available without using the hook. He also said that if he had put his hook back on his belt he could have returned to work.

64. Gilles Roussel, a day shift rodman, testified he thought wearing the belly-hook was unsafe because of the rodmen's tendency to abuse it by climbing the walls with bars and trying to hang on using the hook. He said that he decided to take the hook off his belt on Friday afternoon,

after Mr. Donaldson and Mr. Murphy talked to his crew. He said that he took off the hook with the rest of his crew. Mr. Roussel acknowledged that there is a difference between wearing the hook and using the hook and that many times he has worn the hook when he has not needed to use it. He also said that if everybody had worn the hook he would continue to wear it and that if he had put the hook back on his belt he could have gone back to work.

65. Luzfi Colak worked as a rodman foreman on the day shift. He testified that he thought that the belly-hook was unsafe. He testified that he and his crew took their belly-hooks off on Monday June 9. He said that he got the message from someone from the union to take the belly-hooks off. His crew was the last group to take their belly-hooks off because they were working away from the others. He testified that his entire crew took their hooks off because they were told that if everyone took their hooks off the company could not blame just one person.

66. Jim Flynn worked as a rodman on the night shift. He worked on a service crew and did not need to use the hook to perform his work. He testified that he missed two days of work because his crew went out in sympathy with the other rodmen. He had worked as a rodman for twenty-three years and had never refused to wear the hook before. He also testified that he normally did not wear his belly-hook when working on a service crew, and that his crew was not stopped from working.

67. Art Perry was a rodman working on the day shift. He did not refuse to wear the hook on the morning of June 6 because he was working on slabs. He testified that word then came around that the other rodmen were refusing to wear their hooks so he took his hook off and put it in his lunch pail. He had been told by his foreman that if they did not wear their belly-hooks then they could not go to work. He understood that everyone had to stick together to refuse to wear the belly-hooks. He also testified that if someone was wearing the belly-hook when the others had decided not to, that person would be considered a scab.

68. Marcel Bourque worked as a rodman on the day shift. He refused to use the belly-hook because he thought it was unsafe. He took his belly-hook off when Mr. Donaldson came by his crew on Friday June 6 and told him and others that they did not have to wear the belly-hook because it was unsafe. Mr. Bourque had been a rodmen for twenty years and always wore the belly-hook on his belt. He testified that the work that he performed did not require the use of a hook and that on the Monday when he refused to wear the hook he did not need to use it. He also said that there were lots of times when he would wear the hook on his belt and not use it because the hook was part of the tools of a rodmen. Mr. Bourque testified that nobody on his crew wore the hook and that they all had to stick together.

69. Mr. Pearce testified he took his hook off on Friday because he did not need it and he wanted to show the company and others that he was going to take his hook off. Mr. Pearce had worked as rodman for ten years and he had worn the hook during that time and had never objected to using it before.

70. John MacMillan, the rodman steward on the afternoon shift, testified that his crew did not need to use the hook to do their work. His crew was a service crew. That crew went out in sympathy with the rodmen on the day shift. The service crew did not wear the hook because they never had to use it and were permitted to continue working after Monday.

71. Len Loder was a day shift rodman foreman. He testified that he has not worn a belly-hook for fifteen years because he supervises the work of others. His crew did not use the belly-hook because they did service work. All of the members of Mr. Loder's crew refused to wear their hook because they did not need it to do their work. Mr. Loder and his crew were not told by Gil-

bert Steel Limited that they could not work if they did not wear the belly-hook. Nevertheless, Mr. Loder and his crew did not work on Monday June 9 after the meeting with Mr. Dietrich when the rodmen went to the union hall.

72. Noel Tulloch was a rodman on the day shift. The work he was assigned to perform did not require him to wear a belly-hook. He testified that he stopped wearing the belly-hook on Friday June 6. He had worn the hook all the time but used it very rarely. He said that when he refused to wear the hook he knew that everyone else was refusing. He said that he had to do because the majority was refusing to wear it and he had to work together with them.

73. Hamza Colakague worked as a rodman on the day shift. He testified that he refused to use the belly-hook on the Friday June 6 because it was unsafe. At the time of his refusal, the kind of work that he was doing did not require him to use the hook most of the day. He testified that he refused on that day because that was the time that everybody decided not to use the belly-hook.

74. Richard Levesque worked as an apprentice rodman. He testified that he refused to use the belly-hook because it was unsafe. He said that a decision was made by all of the men to ban the use of the hook on Friday, June 6. He said at that time he decided that he would not wear his hook anymore.

75. Edward Howse worked as an ironworker in the fabrication yard. He testified that he did not refuse to use the hook because he never used it in the work he did. He said that on June 9 the union steward came to his crew and said that the day shift had gone off the job. He testified that when he was told that he and the rest of his crew walked out in sympathy with the morning shift. His crew did not need to use a belly-hook in their work.

76. Roger Landry worked the afternoon shift as a working foreman. He testified that he refused to use the belly-hook between June 6 and June 19. He refused to wear the belly-hook on Monday June 9. He testified that he decided that he would not wear the belly-hook when he was told that the day shift had decided not to wear the belly-hook.

77. Carl Pohl worked on the day shift as a rodman on a service crew. His crew never wore the hook. The crew was told by Guy Morrency that the dispute with the other rodmen had nothing to do with his service crew and that they could go back to work. Mr. Morrency later told him that unless he wore the hook on his belt he would not be allowed to go to work. He testified he knew he could go back to work if he wore the hook but refused to wear it.

78. Silas Gibbons worked as a rodman foreman on the day shift. He testified that his crew would need the hook to do their work, but that they refused to wear their hook on Monday June 9. He agreed that the rodmen would wear their hooks on their belts even if they did not need to use them. He testified that he refused to use the hook because it was unsafe but also testified that if other people had not refused to wear the hook, he would have continued to wear it.

79. Kevin McDonald, a rodman apprentice, testified that he and the other members of his crew refused to wear the belly-hook. In his training as an apprentice, he had been taught about the use of the hook. He refused to wear it when the others in his crew had refused.

80. Antonio Sousa, a rodman on the day shift, testified that he decided to remove his hook from the belt at the meeting on Monday June 9. At that time, Mr. Dietrich had told the meeting that they had to wear their hook in order to go to work. Mr. Sousa testified that all the men altogether decided that they would not wear the hook and it was at that point that he decided to take

his hook off. He said that when everybody refused to wear the hook he also refused but if everyone had continued to wear it he would have worn it also.

81. Wayne Perry, a rodman on the day shift, testified that he had decided to refuse to use the hook when he was told that it was his decision whether or not he could wear it. He also recalled being told by the union that he had the right to refuse to wear the hook. He testified that he and his crew had met, either on Friday or Monday, and they decided that they would all take their hooks off.

82. Vittorio Bianchi was a rodman who worked on a service crew. On occasion he needed to use the belly-hook to place some rods. He testified that when he attended the union meeting, Mr. Donaldson had told the group that no one in Local 721 was to use the belly-hook. He said that was why he did not wear it any longer.

83. Valentino Sirianni, a rodman on the day shift, testified that he was waiting for the day that one could stop using the belly-hook. He testified that he stopped using it on Monday June 9. He decided not to use the hook when everyone on his crew decided that they would take the hooks off their belts before starting work.

84. Clarence Dugay, a rodman on the day shift, testified that his foreman had told his crew that the union had said that they were not to wear the belly-hook. He testified that he thought the hook was unsafe and was pleased that someone was finally taking a stand. He said that his foreman had told them that if they did not wear the hook there would be no work for them to do. Mr. Dugay testified that he was told that everybody was taking their hooks off so that he decided he would do it as well. The entire crew took their hooks off at the same time. He also said that he was prepared to take his hook off but if the others on his crew did not, he would still have worn his belly-hook.

85. Gerry Cascone testified that he refused to wear the belly-hook because everybody should stick together and get rid of it. He said that he took off his hook because the others had taken off theirs.

86. Pat Inglese worked as a rodman foreman. He testified that he refused to use the hook between June 6 and June 19 although the work that he was assigned to do did not require a hook. He was working on horizontal slabs and prior to June 6 wore the hook on his belt even though the work that he was doing did not require the use of the hook. He testified that he decided not to wear the hook when the other people at the meeting said they would not wear their hooks.

87. Steve Kosa, a rodman on the day shift worked on horizontal slabs and did not require a hook to perform his work. He decided to take the hook off his belt after the meeting at the union hall on Monday. He testified that he understood that everybody at the meeting had decided that they would no longer wear the belly-hook. He said that he decided that he would not wear the hook because everybody else had stopped wearing it.

88. George McLaughlin, a rodman on the evening shift testified that Jack Rainville, his foreman, came to the crew and told him that the day shift had refused to wear the hook. He asked the crew whether they agreed and they did. He testified that he refused to wear the hook because everyone else had refused and it was an opportunity for him to take the hook off. He also said that he would not refuse to wear the hook if no one else was refusing. The entire crew took their hooks off at the same time.

89. Mike Ferguson, a rodman on the day shift, testified that he and his crew decided to take the hooks off when everyone agreed. He testified that he thought using the hook was unsafe.

90. Romeo Babin was a rodman on the day shift. He testified that he refused to use the belly-hook but he was working on horizontal slabs when the refusal occurred. He said that he refused to use the belly-hook because all of the other guys said it was not safe to use the hook. He took the hook off his belt when everyone agreed that they would not wear the hook any longer. He never refused to use the hook in his twenty-seven years as a rodman, and took the hook off his belt after the meeting on Monday morning when everyone else had agreed.

91. Jim Welburn, a rodman testified that he refused to use the belly-hook between June 6 and June 19, but was assigned to work in the fabrication shop. He did not use the belly-hook in his work. He testified that although he was off work for a couple of days during that period, when he returned to work he took off his hook from the belt because he wanted to support the others.

92. Joe Vinish was a rodman foreman. His crew did not require a belly-hook because they were working on pipe encasements. He and his crew worked during most of that period without wearing the hook. He testified that he took his belly-hook off his belt as he had been instructed by Mr. Donaldson not to wear the belly-hook. He attended the meeting on Monday June 9 at the union hall. As a result of that meeting he knew that the men would no longer wear their belly-hooks.

93. Eli Canning, a rodman on the day shift, testified that he did not refuse to wear the belly-hook, he simply followed the instructions of his foreman. He testified that his foreman, Amy McFadden, had taken his hook off and had been told by Mr. Donaldson that they were not to wear the hook any longer. He testified that he was present when Mr. Donaldson told Mr. McFadden that they were not to wear the belly-hook until the dispute over the hook was settled.

94. Jennot Beaulieu, a rodman on the day shift, testified that the foreman had told him to take his hook off because Mr. Donaldson had come to the job site and had told them to not wear the hook. He understood that Mr. Donaldson had mentioned that it was not safe to wear the hook. Mr. Beaulieu testified that he took his hook off on Friday June 6 because the union had showed up on the job site and had told him and the crew to remove their hooks from their belt. They followed the union's direction.

95. Mario Plourde, an apprentice rodman, testified that he first refused to wear the hook on Friday June 6 after a group of people had come to the crew that he was on and told them to remove their hook. He testified that he was told that everyone was removing the hook so that he also had to remove his hook.

96. Allen Ebacher, a rodman, testified that the union had told him that the hook was unsafe. He indicated that he also thought it was unsafe and that this was the best time to remove the hook. He said that because all the other rodmen were taking their hook off he would take his hook off as well. He said that Amy McFadden, his foreman, had told him to take his hook off.

97. Gilles Levesque worked at Darlington as an apprentice rodman. He had been told that someone from the union had come around and said that the hook was not to be worn.

98. Leonardo Vitale, a rodman, testified that he refused to use the belly-hook. He explained that his foreman told him he was not to use the hook any longer. The foreman advised him that the union had said that the crew was not to wear the belly-hook.

99. Michael St. John, a rodman, testified that his crew had met before work and they decided together that because crews were not wearing their hook they would also leave their hooks in their tool box. He testified that he recalled being told that he could either wear his hook or go home.

100. Joe Gustin was a rodman foreman at Darlington. He testified that he had never refused to use a hook before June 6. He also testified that he was unsure whether the union had told him not to wear or use the hook but that everyone had decided together that they would not wear the hook at their meeting on Monday.

101. Amy McFadden was employed as a rodman foreman. He testified that on Friday morning June 6, Mr. Donaldson had come around and said that they did not have to wear the hook any longer. He testified that he decided that he would not wear the hook when he met with his crew and they all took their hooks off.

102. There were several differences in the testimony of the rodmen but there were several common themes to that evidence. Generally, the rodmen expressed the view that working with a belly-hook was unsafe. Although many knew that they had right to refuse unsafe work, they did not exercise that right until all of the others had done so. While we do not doubt that the rodmen expressed genuine concern about using the belly-hook when working on vertical walls it was abundantly clear from their evidence that the rodmen refused to *wear* their belly-hook, even when their work did not require them to use it.

103. Counsel for the union, in argument, suggested that anyone who was required to wear the belly-hook would be expected to use it. That may be so, but the fact remains that Gilbert Steel required the rodmen to wear their hooks on their belt. A rodman who was assigned to perform work that does not require the use of the belly-hook does not, in our opinion, have reason to believe that wearing the belly-hook is likely to endanger himself or others.

104. Section 23 of the *Occupational Health and Safety Act* permits workers to refuse to perform work where there is a reason to believe that the performance of such work is likely to endanger themselves or others. The scheme of section 23 is designed to focus the employees and their employer on the work or the workplace circumstances in order that a proper investigation and appropriate remedial action can be taken. As Board commented in *Inco Metals Co.*, [1980] OLRB Rep. July 981, employees do not have the right to refuse to perform work because other employees are faced with hazardous work. The Board wrote at paragraph 58:

58. The rights conferred by the Act are not unlimited. Nothing for example, permits employees who are not themselves involved in a perceived safety hazard the right to down their tools out of sympathy for another employee whom they think is confronted with unsafe work. Before any employee can invoke the right to refuse work he must have reasonable grounds to believe that he himself is in jeopardy or that he will place another employee in jeopardy if he proceeds to work. The question must always be whether the employees refusing to work, whether individually or as a group, each have sufficiently close relationship to a perceived hazard that they are themselves in peril or that they will put another employee in peril by performing their work. Moreover, the refusal to work protected by the statute is not a general withholding of services. An employee who protests that working conditions on a particular job are unsafe can't refuse to perform alternative work that isn't unsafe.

105. In our opinion, there is nothing in the *Occupational Health and Safety Act* that confers upon rodmen the right to refuse to wear a belly-hook. An employer may require an employee to *wear* a particular item so long as the wearing of it does not create a situation where an employee has reason to believe that it is likely to endanger himself or others. If the employee refuses to comply with the employer's direction in those circumstances, the employer is at liberty to suspend or

otherwise discipline an employee, subject to any collective agreement review, without violating the *Occupational Health and Safety Act*.

106. In our opinion, the refusal by rodmen to wear their belly-hooks on their tool belt did not give rise to a situation that is protected by the Act. Clearly, employees who are assigned to perform work that did not need a belly-hook and who refused to wear their belly-hook were not in a situation where the wearing of the belly-hook was likely to endanger themselves or any other rodmen. We acknowledge that Local 721 did not seek compensation in respect of those employees at the conclusion of the evidence. Nevertheless, their refusal to wear the belly-hook must also affect our assessment of the action taken by the rodmen who would have had to use the belly-hook to perform some of their work.

107. Gilbert Steel required all employees, with some exceptions, to wear their belly-hooks. If they refused, they would not be assigned further work. No distinction was made by either the rodmen or Gilbert Steel between the rodmen who might need to use the hook and those who did not. In our opinion, that distinction is a critical one. If the rodmen continued to wear the belly-hook but merely refused to perform the work that required the use of the belly-hook, then both the rodmen and Gilbert Steel Limited would have been in a position to assess the specific problem at the time. If the employees' refusal related to an expressed concern about chronic back pain, or the absence of scaffolding then at that point, the steps contemplated by section 23 of the *Occupational Health and Safety Act* could have been invoked. A reaction by Gilbert Steel Limited to such a work refusal could then have been assessed to determine whether section 24 was violated.

108. What took place between June 6 and June 20 was not a refusal to perform work. Indeed, the evidence was clear that the rodmen did not refuse to work and had been prepared to work without wearing a belly-hook. Gilbert Steel simply did not assign them to work when they refused to wear their belly-hook. We are of the view that the rodmen's refusal was a challenge to their employer's direction to wear a particular piece of equipment as a way of demonstrating that they would not use that equipment under any circumstances. As was evident, in some limited circumstances even Mr. Donaldson and Local 721 would agree that the use of the belly-hook was not likely to endanger anyone. The wearing of the belly-hook did not in and of itself create any danger nor would the wearing of the belly-hook be likely to endanger anyone else. On the basis of all of the evidence, we are satisfied that the rodmen did not have reason to believe that wearing the belly-hook was likely to endanger anyone.

109. During the course of the hearing, the Board received into evidence certain photographs. The admissibility of those photographs was contested. Counsel requested that the reasons for the majority's ruling be incorporated into our decision. That ruling of the majority, J. Wilson dissenting, is as follows:

Counsel for the union wishes to introduce into evidence photographs of a model or demonstration wall to illustrate the use of the belly-hook. The photographs were taken of a demonstration carried out at the union's rodmen training centre in Toronto. It was based on the experience of Gary Cleeton, apprentice co-ordinator of Local 721 who had worked at Darlington as a working foreman for Gilbert Steel for approximately three and a half years.

Mr. Cleeton had supervision of a gang rodmen building platform slabs, walls and columns at various locations throughout Darlington. He used that experience to create a model for the demonstration to be photographed. Mr. Cleeton did not supervise work on the reactor walls while working at Darlington and consequently did not base his model on that kind of structure. At the times of the refusal in June 1986, much of the work related to the building of reactor walls.

While the size of the rod and the number and spacing of the rods differed depending on the size and specifications of the wall being built, the process of building a wall was similar. Additionally, while the refusal arose out of the use of the belly-hook, principally on reactor walls, much of the evidence we heard about the use of the hook was not confined to it being used on reactor walls, but related to its use on other kinds of structures.

While we recognize that the photographs do not illustrate the work that was being done at the time of the refusal, we are satisfied that they can be illustrative of some of the *viva voce* evidence that we heard concerning the use of the hook. Additionally, this panel has taken a view of the job site and has observed the kinds of structures that were being built, when the work refusal occurred. We believe that pictures illustrating the manner in which the hook was used, taken together with our view of the size and spacing of the rods that were being used on the reactors walls can assist us a great deal in appreciating the *viva voce* evidence we have heard thus far. We therefore find that the photographs are relevant to the issues before us. The objection to the admission of the photographs is hereby dismissed.

Mr. Wilson dissented because he was of the view that the pictures were not relevant. The demonstration was done long after the complaint arose. The photographs show the work being done by apprentices not experienced rodmen. The thickness of the wall, the size and spacing of the rods all differed. In view of the differences between the model and the work that was actually being done at the time, photographs of the model are not relevant and he would uphold the objection.

110. We are satisfied that Gilbert Steel's response to the rodmen's refusal to wear the belly-hook did not constitute a violation of section 24 of the *Occupational Health and Safety Act*. The evidence established that throughout the period from June 6 to June 20, work was not done by the rodmen because Gilbert Steel would not assign work to rodmen who refused to wear the belly-hook. We note that prior to that time and as part of the agreement resolving the dispute, the occasional, but infrequent use of a belly-hook was contemplated. During the period in question the rodmen refused to wear the belly-hook. It seems therefore that the use of a belly-hook may or may not create some health or safety risk, depending on the particular circumstances that exist at any point in time. Had there been a refusal to perform specific work that was assigned, an assessment of those circumstances could have been undertaken, including an examination of the reason the worker or workers had for refusing to perform such work. The refusal to wear the belly-hook constituted, in our view, a statement that the belly-hook would not be used until the concerns of Local 721 and Mr. Donaldson were addressed. We recognize that those concerns related to safety in the workplace in a general sense and to the procurement of additional scaffolding for the rodmen. Nevertheless, we are of the view the rodmen's refusal to wear the belly-hook was not motivated because *wearing* the belly-hook was likely to endanger themselves or others. Therefore, when they refused to wear the belly-hook, they were not engaged in a refusal contemplated by section 23 of the Act and therefore the response of Gilbert Steel to their refusal did not violate section 24.

111. We are persuaded that Gilbert Steel did not act contrary to section 24 of the Act when it refused to assign rodmen to perform work while not wearing their belly-hook and not to pay them for the time not worked.

112. In the result, the complaint under section 24 of the *Occupational Health and Safety Act* is hereby dismissed.

113. For all the reasons aforesaid, the application under section 135 of the *Labour Relations Act*, the complaint under section 89 *Labour Relations Act* and the complaint under section 24 of the *Occupational Health and Safety Act* are hereby dismissed.

PARTIAL DISSENT OF BOARD MEMBER W. GIBSON; February 26, 1990

1. While I concur with the dismissal of the application under section 135 of the *Labour Relations Act*, and the complaint under section 24 of the *Occupational Health and Safety Act*, I must dissent from that portion of the majority decision on the section 89 complaint which is set out in paragraph 26 of that decision. To me this is clearly a breach of section 131(1) of the *Labour Relations Act*. Here we have a case where an agreement was signed between Local Union 721 and Ontario Hydro altering a work practice which had been in existence for over 20 years. Although this work practice is not specifically spelled out in the collective agreement, all parties had accepted this work practice for more than two decades, and Local 721 tried to amend this practice in the last round of collective bargaining by proposing a rotation system for working with the belly-hook, plus a demand that the employer supply the hooks to rodmen without cost. When their accredited bargaining agent failed to achieve this in bargaining, they initiated some job site action on the issue, which culminated in an agreement being signed by Local 721 and Ontario Hydro which called for the construction of an additional level on the scaffolds in order to minimize, if not eliminate, the need for the use of the belly-hook. This obviously involves an additional cost factor to the employer, which had previously not been necessary under the long-standing practice on the use of belly-hooks. *Neither* of the Accredited Bargaining Agencies, E.P.S.C.A. and the International union, were signatory to the agreement.

2. Section 131(1) of the *Labour Relations Act* states:

131. (1) *No trade union or council of trade unions that has bargaining rights for employees of employers represented by an accredited employers' organization and no such employer or person acting on behalf of such employer, trade union or council of trade unions shall, so long as the accredited employers' organization continues to be entitled to represent the employers in a unit of employers, bargain with each other with respect to such employees or enter into a collective agreement designed or intended to be binding upon such employees and if any such agreement is entered into it is void.*

[my emphasis added]

3. Here we have a case where a trade union and an employer bargained together to vary a work practice long existing under the collective agreement, without the agreement of either accredited bargaining agent, despite the wording of section 131(1) which states that they shall not bargain together with respect to employees of employers represented by an accredited employers' organization.

4. To preserve the integrity of the accreditation process, I believe this agreement between Local 721 and Ontario Hydro should be declared null and void.

PARTIAL DISSENT OF BOARD MEMBER JOSEPH F. KENNEDY; February 26, 1990.

1. I have had the advantage of reading the majority's opinion. I concur with the decision to dismiss the section 135 application and section 89 complaint for the reasons set out in the majority's decision in paragraphs 28 to 32. I dissent, however, with respect to the complaint under section 24 of the *Occupational Health and Safety Act* ("OHSA") which I would have allowed for the reasons set out below.

2. The OHSA was enacted for the protection of workers. The *Interpretation Act* R.S.O. 1980 c.219 provides:

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of anything that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpreta-

tion as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

It is now well settled law that the OHSA and similar statutes intended to protect and enhance the rights of workers are remedial legislation that should be interpreted and applied such that the benefit of the doubt is resolved in the worker's favour: see *Re Abrahams and A-G Canada* (1983), 142 D.L.R. (3d) 1 (S.C.C.); *Canadian National Railway Company v. Canadian Human Rights Inco Metals*, [1980] OLRB Rep. July 1981.

3. In this case, as the majority notes at paragraph 36 of its reasons President John Donaldson and other officials of Local 721 "have had a genuine and sincere concern over the use of the belly-hook for many years." At least 12 ironworkers specifically testified that they thought working with the belly-hook was unsafe, and other ironworkers gave testimony that although less direct in nature still corroborated by implication the evidence of their co-workers. There are times when a group of people must band together in a concentrated effort to bring to a halt a safety hazard that affects a few in the same jurisdiction. If they had all continued to wear the belly-hook, even though it was not necessary in the majority of their work, the Company would have forced the few that needed the belly-hook to wear it. The employees believed that if they refused, the Company would have sent them home and recruited from the ranks those who had belly-hooks on their belts. A group refusal to perform unsafe work is equally fully protected by the OHSA as that of a lone individual: *Inco Metals supra*; *Camco Inc.*, [1985] OLRB Rep. Oct. 1431; see also *Northwood Pulp & Timber Ltd.* (1983), 2 Can. L.R.B.R. (N.S.) 74 (B.C.)

4. In matters of safety, the principle of "work now and grieve later" does not apply: *Wilco Canada Inc.*, [1983] OLRB Rep. Oct. 1759. Rather the OHSA expressly permits a worker to refuse to perform work that in the first instance the worker has "reason to believe" is unsafe (OHSA s.23(3)); and following investigation that the worker has "reasonable grounds to believe" is unsafe (OHSA s.23(6)). The genuine concern about the relationship of the wearing and use of belly-hooks and the incidence of chronic back pain that motivated the workers surely meets both tests. The majority's distinction between the wearing and use of belly-hooks is an utterly artificial one; where an employer requires an employee to wear or carry a particular tool, it is because the employer expects the tool to be put to use. Gilbert Steel Limited was not responding to fashion trends when it ceased to make work available to ironworkers refusing to wear the belly-hook, it was instead ordering that this piece of equipment be used.

5. Thus, it may be seen that the employer reacted to the workers' safety-motivated work refusal by imposing the penalty of lost work. This constitutes a violation of section 24 of the OHSA, for that section is violated whenever any part of the reason for taking action against an employee is that he or she acted in compliance with the Act: *Black & McDonald Ltd.*, [1983] OLRB Rep. Dec. 1971. Hence, I would have allowed the OHSA complaint, and remained seized with the issue of remedy.

**2078-89-M Glenn A. Gilmore, Applicant v. CAW TCA, Respondent Trade Union
v. John Deere Welland Works, Respondent Employer**

Religious Exemption - Applicant opposed certification because no vote held and because he believed it created workplace disharmony - Applicant objecting to potential use of union dues for non-collective bargaining purposes - Applicant objecting as Christian to union defiance of company through strikes or negotiation pressure - Applicant signing union membership card on mistaken belief he would have to join union - Board not satisfied that objection to paying dues motivated by religious beliefs - Objection to paying dues based on dissatisfaction with certification process and nature of union representation - Application dismissed

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *B. L. Armstrong* and *W. H. Wightman*.

APPEARANCES: *Glenn Gilmore* on his own behalf; *Bill Orr* for the respondent.

DECISION OF THE BOARD; February 12, 1990

1. This is an application pursuant to section 47 of the *Labour Relations Act*.

2. Section 47(1) reads as follows:

47.-(1) Where the Board is satisfied that an employee because of his religious conviction or belief,

(a) objects to joining a trade union; or

(b) objects to the paying of dues or other assessments to a trade union,

the Board may order that the provisions of a collective agreement of the type mentioned in clause 46(1)(a) do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree then to such charitable organization registered as a charitable organization in Canada under Part I of the *Income Tax Act* (Canada) as may be designated by the Board.

3. At the conclusion of the hearing into this matter on February 8, 1990, the Board orally delivered a decision with reasons, which we hereby set out in writing.

4. We have no doubt that the applicant sincerely holds religious beliefs. But we must be satisfied that he objects to paying dues because of those beliefs.

5. The evidence discloses that Mr. Gilmore actively opposed the union's organizing campaign, in major part because no vote was held in the work place and because he felt discord and disharmony in the work place resulted. Mr. Gilmore objects to the union perhaps causing pressure on the employer and employees during strikes or negotiations or other interactions. He objects to how his dues may be utilized by the union, to support the NDP or organizations that he describes as supporting abortion.

6. The evidence also shows that after the union was certified, Mr. Gilmore signed a membership card, because he felt he would have to in any event join the union. However, under the

applicable collective agreement employees need not become members of the Union. With respect to his dues, the Board was advised by the CAW that the CAW allows Mr. Gilmore to elect that his dues not be used for certain purposes, including those purposes he objects to.

7. At the hearing, in giving reasons the Board noted that Mr. Gilmore had also testified that if the majority of employees wanted the union, he would more readily go along with it. Mr. Gilmore commented to the Board upon the conclusion of its oral reasons that that answer had been given on the understanding that all the dues would be used for representing the employees and not other causes. The Board agrees with Mr. Gilmore's recollection and did not mean to take the portion of his testimony quoted out of context. To set out that testimony more fully now, Mr. Gilmore had been asked if there were no strikes and the dues he paid were all to be used for the improvement of the lot of employees, would he still object to paying such dues to the union. In response, Mr. Gilmore testified "that before the union was certified, I was on the pension committee, and we were given an opportunity to work on the Employee Manual. Then the union came in and became certified and this had to halt. Would I object if all the dues were going back to the employer? Not as strong, but I'd still say why do we need it anyhow. If the majority of guys wanted it, I'd more readily go along with it. When it comes to the point of using means to deliberately defy the company, then I could not support the union. If the union could peacefully negotiate with the company, then it would be okay. If it was forcing the company, I could not be part of that as a Christian."

8. Our decision will not assist Mr. Gilmore with how he conducts himself should a strike or lockout occur, a matter of some understandable concern to him. We are only asked to grant the exemption sought, which is an exemption from paying dues. Mr. Gilmore must still eventually perhaps deal with what he will do should a strike occur.

9. In all the circumstances, and in light of the evidence, we are not satisfied that his sincere religious beliefs are the grounds for his objection to paying dues. Rather his objection in this respect in our view is based upon his dissatisfaction with how the union became certified and with how he thinks the union will represent employees in the work place. His religious beliefs do not therefore cause his objection to paying dues. We note that the union advised the Board and Mr. Gilmore that he can elect to not have his dues used for the purposes to which he objected. The Board need not therefore deal with that aspect of the application.

10. However, given his concerns, and that in the result he need not have become a member, the CAW might wish to return his membership card to him. Similarly, the parties should discuss how Mr. Gilmore can ensure that his dues not be used for the purposes to which he objects.

11. For the above reasons, this application was dismissed.

2673-89-R Amalgamated Clothing and Textile Workers Union, Applicant and v. Goody Canada Limited, Respondent

Certification - Natural Justice - Practice and Procedure - Trade Union - Union filing membership evidence - Union name on cards different from name under which application brought - Board will not treat application for membership as membership in another union unless former is local of latter - Board satisfied application intended to be brought by union named on membership cards - Board permitting amendment to union name on application - Board extending terminal date and directing new posting of Form 6 Notice of Application at workplace

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *J. A. Rundle* and *B. L. Armstrong*.

APPEARANCES: *J. Hayes*, *Jack Matraia*, *Frank Aquino* and *Tony Pileggi* for the applicant; *Irv Kleiner*, *Stephen L. Wood* and *D. Lynch* for the respondent.

DECISION OF THE BOARD; February 23, 1990

1. This application for certification was filed in the name of "Amalgamated Clothing and Textile Workers Union Toronto Joint Board" (hereafter referred to as "the joint board"). That organization was found to be a trade union in Board File 0850-78-R.
2. When the applicant and respondent attended the hearing scheduled in this matter, they were advised that the membership evidence filed by the applicant consists of applications for membership in the "Amalgamated Clothing and Textile Workers Union" (hereafter referred to as "the international union"). An organization by that name was found to be a trade union in Board File 0956-76-R. According to their representatives and counsel, "Amalgamated Clothing and Textile Workers Union" and "Amalgamated Clothing and Textile Workers Union Toronto Joint Board" are two distinct trade unions.
3. An application for membership in one trade union is not treated as evidence of membership in another unless the former is a local of the latter, which is not the case here. At hearing, we were asked to amend the application to name "Amalgamated Clothing and Textile Workers Union" as applicant. The respondent did not oppose the request. Having regard to the representations of the trade unions involved and their history of organizing, we were satisfied that this application was intended to be brought by the organization to which the membership evidence relates. In the circumstances, we granted the request. The title of these proceedings has been amended accordingly.
4. There then arose the question whether the affected employees had been given proper notice that the international union had applied to be certified as their bargaining agent, when the only notice they had was the Board's Form 6 notice naming the joint board as applicant. It may be, as counsel's submissions and representations suggest, that the affected employees would be indifferent about the distinction. It is not for us to assume away their right to decide whether they care, however. Given the importance which the Board's jurisprudence assigns to the separate existence of related trade unions, we cannot treat notice to employees of an application by the joint board as notice of an application by the international union.
5. As the respondent was content to have us proceed without first giving notice to the affected employees, counsel for the applicant suggested that we do so and give notice of the result to the affected employees so they could make representations if they wished. In answer to that sug-

gestion, we adopted the observations of the Board (somewhat differently constituted) in *Trans Continental Printing Inc.*, [1989] OLRB Rep. Nov. 1187 at paragraph 10:

10. We are not dealing here with a situation in which the Board has decided a point in the belief that all those affected have been given notice and has later discovered that through misunderstanding or misadventure some affected persons have not had notice. In those circumstances it would be highly appropriate for the Board to bring the decision to the attention of those whose possible lack of notice it has subsequently discovered and request that any application for reconsideration on those grounds be made within a particular period of time. That is not the situation here. We know there are affected parties who do not have notice. They are entitled to a hearing before the Board makes a decision, not just the opportunity to persuade the Board to change a decision made in deliberate disregard for their right to notice and of the Board's statutory obligation to give such notice. No one would seriously suggest that the Board could respond to a certification application by giving the employer notice that the application had been granted subject to the employers right to request reconsideration. The employer's right to notice and the opportunity to participate in a hearing *before* a decision is made is no greater than that of the affected employees.

In our view, the affected employees are entitled to notice of the international union's application before the Board considers it.

6. Accordingly, we direct the Registrar to prepare and forward to the respondent for posting fresh Form 6 Notices to Employees reflecting the amendment to name the international union as applicant. We hereby extend the terminal date to a date to be fixed by the Registrar. In fixing that date, the Registrar is to apply the principles of section 2 of the Board's Rules of Procedure with reference to the date on which the new Notice to Employees is served on or mailed to the employer for posting. The Registrar is also directed to relist this matter for hearing. The new hearing date and extension of terminal date are to be reflected in paragraphs 2 and 3, respectively, of the new Notice to Employees.

1905-89-R Ronald Gary Emmons, Applicant v. Retail, Wholesale & Dept. Store Union AFL, CIO, CLC, Respondent v. Hully Gully London Ltd., Intervener

Termination - Evidence - Petition - Inadequate first hand evidence of origination and preparation of petition - Gaps in evidence of custody - Incomplete evidence on circulation of petition and circumstances surrounding each signature - Evidence inconsistent - Board unable to accept petition as voluntary expression of employee wishes - Application dismissed

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *M. Rozenberg* and *P. V. Grasso*.

APPEARANCES: *Ronald G. Emmons* and *Sharon Fennema* for the applicant; *Robert McKay* and *Don Hall* for the respondent; *P. Melady* and *R. Elley* for the intervener.

DECISION OF THE BOARD; February 7, 1990

1. This is an application under section 57 of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.

2. This application was filed on November 1, 1989. The employees who are affected by this application are covered by a collective agreement between the respondent and the intervener which was in effect from September 12, 1988 until December 3, 1989. Having regard to the provisions of section 57(2) of the Act, the Board finds that the application is timely.

3. The participants agree that the bargaining unit which is the subject of the application consists of

all employees of Hully Gully London Ltd. in the Township of Westminster, save and except department managers, persons above the rank of department manager, employees regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

4. A timely statement of desire (petition) was filed in support of the application. It contains a sufficient number of employee signatures to cause the Board to conduct its normal inquiry into the origination and circulation of the petition in order to determine whether it represents the voluntary expression of the individuals who signed it.

5. The burden of proving that, on the balance of probabilities, the petition represents the voluntary expression of the employees who signed it lies with the applicant. The Board's reasoning has been set out in *Pigott Motors* 63 CLLC 16,264:

In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.

There is an onus on the applicant to satisfy the Board that the petition filed represents the voluntary wishes of its signatories. In order to satisfy the onus, the Board requires credible evidence regarding the origination, preparation and circulation of the petition.

6. The Board heard evidence from the applicant and from Sharon Fennema regarding the origination and circulation of the petition. In view of the various difficulties in their evidence, some of which will be detailed, the Board has concluded that the onus on the applicant has not been met in this case.

7. The only evidence regarding the origination and preparation of the petition came from Ronald Emmons, the applicant. Mr. Emmons testified that the petition was composed and prepared by Lorne Curtis. Mr. Emmons was unable to recall precisely how he came to contact Mr. Curtis, only that he contacted him by long-distance telephone as a result of someone providing Mr. Curtis' name to him. It should be noted as well that while the applicant lives and works in the London area, Mr. Curtis apparently resides in Windsor. In addition, apart from indicating that Mr. Curtis "has been involved in trade union matters before", Mr. Emmons was unable to explain the nature of Mr. Curtis' interest or qualifications in providing assistance. It was unclear from the applicant's evidence whether his telephone conversation with Mr. Curtis centered on exemption from payment of union dues or on procedures for terminating the respondent's bargaining rights or both. In any event, Mr. Emmons was quite emphatic that he did not discuss the contents of the

petition with Mr. Curtis during this telephone conversation. Notwithstanding that, the applicant's evidence was that some time after this telephone conversation, and in the absence of any further conversation, a petition arrived in the mail from Mr. Curtis, entirely unsolicited. This document, with the name of the employer and union inserted by the applicant in the appropriate blank spots, and with the signatures of a number of employees subsequently obtained is the petition filed in these proceedings.

8. Similar difficulties arose with respect to the evidence regarding the circulation of the petition. The first signature on the petition is dated September 5, 1989; the last October 27, 1989. A total of twelve individuals, who were referred to as T1 through T12, signed the petition.

9. Sharon Fennema was the first witness to testify on behalf of the applicant. In response to initial questioning by the Board and in response to the same question posed several times, Ms. Fennema stated quite categorically that she had only seen the petition once and that was the occasion upon which she signed it. She testified that she was the ninth person (T9) to sign the petition and that she had neither seen the petition prior nor subsequent to signing it. In further questioning by the parties, however, Ms. Fennema proceeded to testify that she witnessed the signatures of T1, T3 and T5 who signed the petition prior to her as well as the signature of T11 who signed the petition subsequent to her.

10. The applicant testified subsequent to Ms. Fennema and was present in the hearing room during Ms. Fennema's evidence. In response to questioning Mr. Emmons testified to witnessing the signature of T2 and testified further that the next person whose signature he witnessed was T7. Subsequently, in response to further questions, he testified that he witnessed the signatures of T5 and T6 on September 8th in the intervenor's parking lot.

11. While these apparent internal inconsistencies in the evidence of both Mr. Emmons and Ms. Fennema might arguably be characterized as innocent lapses in memory, a further unresolved inconsistency surfaced in their evidence.

12. The signatures of T2 - T5 all appear to have been obtained on September 8, 1989. While the signature of T3 is not dated it appears immediately after T2 and immediately before T4 and T5, all of which are dated September 8, 1989. Emmons testified that he obtained the signature of T3 at approximately 5 p.m. in the intervenor's parking lot. He then gave the petition to Fennema prior to 6 p.m. and she visited T3 and T4 in their homes that night and secured their signatures on the document. Both Emmons and Fennema testified that the petition was returned to Emmons the next day, September 9, 1989, at work. It will be recalled, however, that although Emmons initially appeared to indicate not having witnessed T5's signature, he later testified to witnessing that signature in the parking lot after 6 p.m. on September 8. There is simply no way to reconcile these conflicting pieces of evidence.

13. The applicant's evidence concerning custody of the petition is also of concern to the Board. Signatures were collected over a period of almost two months. During that time it would appear that the petition was (usually) kept in the applicant's briefcase in his office at work. Although the basis for his conclusion was not made entirely clear, the applicant conceded that the petition was therefore accessible to the employer. More importantly, however, the applicant further conceded that the petition was not exclusively in his or Ms. Fennema's possession during the relevant times. The Board was not advised, however, as to who, apart from the two witnesses, had custody of the petition at various times. This, in conjunction with the concession of management access causes us concern.

14. The Board has declined to accept petitions as voluntary expressions of employee wishes

where there is inadequate first hand evidence regarding the origination and preparation of the petition (see *Dynasty Inn*, [1986] OLRB Rep. Mar. 326; *Markham Hydro Electric Commission*, [1984] OLRB Rep. Oct. 1481; *Upper Canada Glass*, [1981] OLRB Rep. Aug. 1181; *Intercity News Company Limited*, [1981] OLRB Rep. Feb. 171); where there are gaps in the evidence regarding ongoing custody of the petition (see *Canada Dry Bottling Company Ltd.*, [1987] OLRB Rep. Mar. 337; *Mac-Wood Machine Limited*, [1975] OLRB Rep. Nov. 842); where there is inadequate or incomplete evidence regarding the circulation of the petition and the circumstances surrounding *each* and *every* signature thereon (*Skelhorns Bus Line Limited*, [1986] OLRB Rep. Oct. 1435). Petitions have also been rejected where, absent any evidence or allegation of misconduct, the evidence offered on behalf of the applicant is internally inconsistent, unreliable, or otherwise lacking in credibility (see *Custom Foam Specialities Limited*, [1986] OLRB Rep. Dec. 1680; *Fisher Scientific Limited*, unreported October 19, 1989; *Arosan Enterprises Ltd.*, unreported January 9, 1990).

15. The Board is of the view that, given the evidence already adverted to, the petition in these proceedings suffers, in varying degrees, from all of the shortcomings referred to in Board cases cited above. Certainly, in view of the cumulative effect of these, the Board determines that the applicant has failed to meet the onus of satisfying the Board that the petition represents the voluntary wishes of its signatories.

16. Accordingly, based on the evidence before us, we cannot find that the required number of employees in the bargaining unit have *voluntarily* signified in writing that they no longer wish to be represented by the respondent.

17. The application is dismissed.

1653-89-U Retail Wholesale and Department Store Union, AFL-CIO-CLC, Complainant v. Hydon Holdings Ltd. c.o.b. as Hy's Steak House, Respondent

Change in Working Conditions - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Termination of employee involved in organizing campaign and sitting on bargaining committee - Termination occurring during "statutory freeze" period - Employee terminated for irregularities in credit card vouchers - Board satisfied on balance reasons given by employer were only reasons for termination - Complaint dismissed

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *W. A. Correll* and *K. Davies*.

APPEARANCES: *Sean McGee*, *Harry Ghadban*, *Robert McKay*, *Howard Poon* and *Fernando Cagigal* for the complainant; *B. Carroll* and *Roger Moss-Norbury* for the respondent.

DECISION OF THE BOARD; February 20, 1990

1. The title of this proceeding is amended to describe the respondent as: "Hydon Holdings Ltd. c.o.b. as Hy's Steak House".

2. This is a complaint under section 89 of the *Labour Relations Act* ("Act"). As originally filed, the complaint alleged

- (a) that the respondent terminated the employment of Howard Poon, contrary to sections 64, 66(a), (b) and (c), 70 and 79 of the Act;
- (b) that the respondent changed its policy with respect to the persons authorized to give relief from the general requirement to contribute to a "tip pool", contrary to section 79 of the Act; and,
- (c) that the respondent introduced a new policy curtailing the opportunity of servers to obtain gratuities in excess of 15% in certain cases, contrary to section 79 of the Act.

During argument, counsel for the complainant abandoned the allegation concerning the respondent's policy on "tip pool" relief. This decision deals with the other two allegations.

3. The respondent operates restaurants in several Canadian cities. Its restaurant in Ottawa was the subject of an organizing campaign by the complainant in August of 1988. The leading employee organizers were Howard Poon and Fernando Cagigal. On March 15, 1989, the complainant was certified as exclusive bargaining agent for a full-time unit and a part-time unit of employees of the respondent. The events complained of occurred in September 1989. The parties were still bargaining for their first collective agreement and no conciliation officer had been appointed; accordingly, the "freeze" imposed by subsection 79(1) was then in effect.

4. In late 1987 or early 1988, the respondent instituted a practice that when a customer reserved a table for nine or more persons, he or she would be asked up to agree in advance to the payment of a 15% gratuity. This practice grew out of the respondent's experience that large groups sometimes failed to leave a tip or left a tip which was quite inadequate in relation to the amount of work performed by the servers. When the customer making the reservation agreed to the suggestion that there be a gratuity in the amount of 15%, a note to that effect would be written in the book in which reservations were recorded. When a server had a large party to serve, he or she would know from that book whether the customer making the reservation had agreed in advance to pay a 15% gratuity. If such an agreement was noted, the server would calculate the 15% and draw the amount to the customer's attention when presenting the bill. That much of the policy was clear to everyone from the beginning.

5. Most of the customers of Hy's restaurant in Ottawa, particularly those in large groups, pay their bills by credit card. Standard credit card slips or vouchers have four boxes in which amounts may be filled in. The top box is labelled "Merchandise/Services" on an American Express voucher, "Services" on a Master Card voucher and "Amount" on a Visa voucher. The box below that is labelled "Tax". The box below that is labelled "Tips/Misc." (American Express), "Tip" (Master Card) or "Tips" (Visa). The bottom-most box is labelled "Total" on American Express and Master Card slips; on a Visa voucher the only label is "\$ CDN."

6. When a server presenting the restaurant's bill is told by the customer that he or she wishes to pay by credit card, the server uses the customer's card to imprint a credit card voucher. When there has been no advance agreement on the amount of a tip, the process by which the voucher is completed at the respondent's restaurant was well settled. The server would write the amount owing to the restaurant for food, drink and tax in the top box. The voucher would then be presented to the customer with the three other boxes still blank. The customer would fill in the amount of the tip in the third box, place the total in the bottom box and sign the voucher.

7. It is not apparent that any particular instructions were given to servers about completing credit card vouchers for customers paying the bill for large groups when there has been advance

agreement on gratuities. The restaurant's management expected servers to continue to place the amount of the restaurant's bill for food and drink and tax in the top box and, in addition, place an amount equal to 15% of the bill for food and drink in the "Tip" box. The voucher would then be presented to the customer and the transaction would proceed in the usual way. Some servers handled those transactions that way. After handling some transactions that way, however, other servers began taking a different approach. Those servers, including Mr. Poon, began adding the 15% gratuity to the amount owed to the restaurant for food, drink and tax and putting the total in the top box on the credit voucher. That way, the "Tip" box was left blank. When vouchers prepared this way were placed before customers, some of them added a further amount in the "Tip" box.

8. The restaurant's management was not aware that servers were doing this until August 1989. The first discovery appears to have resulted from curiosity about the high level of tips apparently being earned by some servers. The restaurant's management was able to contact a number of customers who had inserted amounts in the "Tip" box after a server had included a pre-agreed 15% gratuity in the amount placed in the top box. A number of such customers said they had not intended to tip more than 15% and had not understood that a 15% gratuity had been included in the amount placed in the top box on the credit card voucher which had been presented to them. The restaurant reimbursed the customers who said they had been misled. Mr. Poon was the server in six such instances.

9. On or about September 15, 1989, the respondent posted a notice to "all servers and bar staff" that

It is Forbidden to add any gratuity to the first box of credit card vouchers. This box must contain only amounts due from the Remamco billing. Tips may be put in the "Tip" box *ONLY*.

"Remamco" refers to the computer system in use in the subject restaurant. All customer orders are keyed into that system; the bill presented to a customer is a bill generated by that computer system, showing the amount due for food and drink and the amount of tax payable.

10. The complainant does not object to the respondent's practice of seeking advance agreement on a 15% gratuity. What it objects to, on the servers' behalf, is that this new requirement with respect to the completion of credit card vouchers prevents or discourages customers who have agreed in advance to a 15% gratuity from giving servers an even larger gratuity if they wish. They say this is a change which violates the freeze imposed by subsection 79(1) of the Act. We do not agree.

11. We are not persuaded that the employer has required servers to insert a 15% gratuity in the "Tip" box when there has been advance agreement on gratuities. While the server may do so, he or she is not obliged to do so. The server has the option of leaving that box blank, so that the customer can fill it in. The prohibition is against including a 15% gratuity in the amount inserted in the top box on the credit card voucher. Even if the instruction in the September 15th notice was new, it does not have the effect complained of.

12. Further, and in any event, we are not persuaded that the instruction violates the statutory "freeze." While it can fairly be said that the instructions given on September 15th were not expressly given before the statutory freeze came into effect, management never gave servers any reason to suppose that they could include a gratuity in the amount they inserted to the top box of a credit card voucher. The freeze under section 79 prohibits the employer from altering "the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, trade union or the employees" except with the consent of the trade union. The complainant does not suggest that it was ever a term or condition of employment of servers that they

could include a gratuity in the amount they inserted in the top box on a credit card voucher. Even if the prohibition expressed in the September 15, 1989 notice could not reasonably be implied from the instructions which servers had been given before the freeze came into effect, there is certainly no evidence to support the proposition that adding gratuities to the amount in the top box on a credit card voucher was in any sense a "right" or "privilege" of servers before the freeze came into effect.

13. His inclusion of gratuities in the top box on credit card vouchers was not the sole or even the primary reason given by the respondent for terminating Howard Poon's employment in September 1989. During the investigation of credit card transactions with reference to that practice, the respondent discovered a credit card voucher which had been physically altered by Mr. Poon after the customer had signed it. The bill for drink and services to this customer had come to \$179.00. Mr. Poon had placed that amount in the top box of a credit card voucher and presented it to the customer. The customer inserted the figure "20" in the "Tip" box and then wrote "\$299.00" immediately below that. Seeing that \$179.00 plus \$20.00 only added up to \$199.00, Mr. Poon added a "1" in front of the "20". He did this without reference to the customer, who had left, and without telling anyone in the restaurant's management what he had done. The very high resulting tip attracted the respondent's attention. As a result of inquiries through the credit card institution, the respondent was able to obtain a photocopy of the customer's copy of the credit card slip. That document clearly showed that the amount originally written in the "Tip" box was "20.00". The general manager of the subject restaurant, Mr. Roger Moss-Norbury, felt this amounted to theft by Mr. Poon from a customer. He says it was this dishonest act which led to his decision to terminate Mr. Poon's employment.

14. In its complaint, the complainant alleged that "it is common knowledge to the employees of the respondent that corrections are made, through various methods, to incomplete or incorrect credit card vouchers." The respondent's uncontradicted evidence is that no one other than the bookkeeper is allowed to alter a credit card voucher in any way. The bookkeeper will check the addition of amounts on a credit card voucher and make corrections to the benefit of the customer if there has been some miscalculation. The corrections are made in such a way as to alert the credit card institution to the variation. The respondent's evidence is that servers are specifically instructed that they are not to alter credit card vouchers in any way and that, moreover, this instruction is standard in the restaurant industry. Mr. Poon's evidence to the contrary stands alone. Indeed, his co-organizer, Mr. Cagigal, testified that it would improper for any server to alter a credit card voucher after it had been signed by the customer. We are satisfied Mr. Poon had no reason to suppose he could alter a credit card voucher after the customer had signed it.

15. When Mr. Moss-Norbury confronted Mr. Poon with the credit card voucher in question, Mr. Poon admitted having altered it. He said he did so because he thought that was what the customer wanted. When he testified before us, Mr. Poon offered some reasons as to why that might have been the customer's intention. It is not apparent that he offered those reasons to Mr. Moss-Norbury at the time. In his testimony before us, however, Mr. Poon also acknowledged that he had been in some doubt about the customer's intention at the time he made the change. He maintained he did not think there was anything wrong with his having resolved that doubt in his own favour to the extent of \$100.00, so as to give himself a \$120.00 tip on a \$179.00 bill. As a result of the conversation he had with Mr. Poon about the alteration of this voucher, Mr. Moss-Norbury came to the conclusion that Mr. Poon had acted dishonestly. We do not have difficulty imagining his having come to that conclusion, having heard Mr. Poon testify before us that he still did not think he had done anything wrong.

16. The complainant says that "anti-union animus" played some part in the decision to ter-

minate Mr. Poon. It points to Mr. Moss-Norbury's candid and not particularly surprising acknowledgement that he had not been happy to learn in September 1988 that a union had organized the restaurant he ran. If only as a result of the certification hearings before the Board, Mr. Moss-Norbury had been aware of Mr. Poon's involvement in the organizing campaign for many months before the termination.

17. Mr. Moss-Norbury reports to Mr. Aisenstat, who resides in Vancouver. He testified that he discussed his decision to terminate Mr. Poon with Mr. Aisenstat before implementing it. Mr. Poon testified that after the organizing campaign began in 1988, he received a telephone call from Greg Kennedy. Mr. Kennedy was a former employee of Hy's restaurant in Edmonton, where Mr. Poon had worked before moving to Ottawa and joining the staff of the Hy's restaurant there. According to Mr. Poon, Mr. Kennedy told him that Mr. Aisenstat was very concerned about the organizing at the Ottawa restaurant and that he would be prepared to meet with Mr. Poon to discuss whatever problems had led to it. Mr. Kennedy suggested that benefits available to employees of other Hy's Restaurants might be extended to employees at the Ottawa restaurant if that was the problem. Mr. Poon told Mr. Kennedy that he did not wish to meet.

18. Mr. Poon also testified about a chance meeting with Mr. Aisenstat in an Edmonton bar some time after the certification. Mr. Poon says the conversation turned to the union's certification. He says at one point Mr. Aisenstat said "what can be done can be undone" and at another point said "well, we're stuck with it. We'll try it for a year; if we don't like it, we can talk about it", or words to that effect.

19. Neither the alleged conversation with Mr. Kennedy nor the alleged chance meeting with the Mr. Aisenstat in Edmonton was the subject of any complaint to the Board at the time they occurred, nor was either of them particularized in this complaint. Counsel for the respondent did not object to our receiving evidence about them. When counsel for the complainant invited us to draw an adverse inference from the fact that Mr. Aisenstat had not testified, however, counsel for the respondent objected to that. He observed that nothing in the material filed by the complainant gave the respondent any notice that behaviour by Mr. Aisenstat would be in question in this proceeding. In the circumstances, he argued, it would be understandable that he would not have been brought to the hearing to answer allegations first made only at that hearing.

20. We agree that nothing in the complaint would have given the respondent notice that any action or decision of Mr. Aisenstat was in issue. The only person identified by the complaint as having acted in the manner complained of was Mr. Moss-Norbury. The impression left by the language of the complaint is that Mr. Moss-Norbury's decision to terminate Mr. Poon was its focus. Indeed, it is the respondent's position that while Mr. Moss-Norbury did speak to Mr. Aisenstat about the proposed termination before it was carried out, the decision to terminate Mr. Poon was taken by Mr. Moss-Norbury for the reasons he gave, and was not the result of any instruction by Mr. Aisenstat. The respondent does not argue that failure to particularize the allegations against Mr. Aisenstat should result in our ignoring the evidence in support of those allegations. Its position is simply that no adverse inference should be drawn from the failure to call Mr. Aisenstat as a witness in these circumstances. We agree.

21. Although the complaint as drafted alleges that the respondent breached section 79 when it terminated Mr. Poon, no specific argument was advanced to support the proposition that the termination somehow violated the statutory "freeze" imposed by that section. Argument focused on the proposition that Mr. Poon's union activities had something to do with the respondent's decision to terminate his employment.

22. Interference with or reaction to the exercise of statutory rights under the *Labour Rela-*

tions Act need not be the sole or even the predominant reason for an employer's action before that action will constitute a violation of the Act. In complaints of this type, subsection 89(5) imposes on the employer the burden of proving that it did not violate the Act. The standard of proof required is proof on a balance of probabilities, not proof beyond a reasonable doubt.

23. The issue in this case is whether the respondent's decision to terminate Mr. Poon's employment was in any way motivated by his involvement in union activities. The issue is not whether the respondent had just cause to terminate his employment, although questions of that sort can have some relevance. As the Board observed in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299:

5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other "peculiarities". (See *National Automatic Vending Co. Ltd.* case 63 CLLC 16,278). If, having regard to the circumstantial evidence, the Board cannot satisfy itself that the employer acted without anti union motivation, the Board must find that the employer has violated the Act. These determinations, however, are most difficult and require an incisive examination of all the evidence. Not only must the Board "see through" the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. The Board cannot find, and neither should it automatically infer, that an employer who has engaged in conduct which is unfair has violated the Act even if the unfair treatment is coincidental with an organizing campaign. However, because of the nature of the proceedings and the frequent requirement for inferential reasoning the Board would be delinquent if it did not consider, for purposes of drawing an adverse inference, unfair treatment during an organizing campaign of itself or in conjunction with the other circumstantial evidence. The Board, therefore, must be acutely sensitive to all of the circumstances and must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct in determining if The Labour Relations Act has been violated.

24. Except to the extent alleged in these proceedings, there is no evidence or allegation that the respondent has discriminated against any employees as a result of their union activity or otherwise acted improperly before during or in the lengthy period since the organizing campaign. Except to the extent dictated by the *Labour Relations Act*, Mr. Moss-Norbury's behaviour toward Mr. Poon and other union supporters remained unchanged until the discoveries in August of 1989. Mr. Cagigal, another key organizer, testified that his personal relationship with Mr. Moss-Norbury had actually improved, for reasons which had nothing to do with anyone's union activity. Mr. Poon was on the union's bargaining committee when discharged. He remains on the committee. The respondent has not objected to that. There is no allegation that the respondent has been bargaining otherwise than in good faith either before or after the discharge of Mr. Poon.

25. When an employer discharges a key employee organizer after an organizing campaign, it is natural to wonder whether the campaign had something to do with the discharge, even if the discharge is said to be for some unrelated reason. Even when the reason offered appears to be a sufficient or just cause for discharge, it would be an unusual case in which the dispassionate observer was left with no doubt at all about whether union activity had played some part in the motivation of the employer. As we have already observed, however, the employer is not required to persuade us of its innocence beyond any reasonable doubt. The standard of proof is proof on a balance of probabilities. We are persuaded, on a balance of probabilities, that the reasons given by the respondent for terminating Mr. Poon's employment are the only reasons for that termination.

26. Accordingly, this complaint is dismissed.

0542-86-R; 0035-86-U The United Food & Commercial Workers International Union, Local 206, Applicant v. **Knob Hill Farms Limited**, Respondent v. Group of Employees, Objectors; The United Food & Commercial Workers International Union, Local 206, Complainant v. Knob Hill Farms Limited, Respondent

Certification - Certification Where Act Contravened - Fraud - Reconsideration - Employer requesting reconsideration of certification on grounds union failed to inform Board of material change in circumstances relevant to exercise of Board's discretion - Local union executive approved merger with other locals while certification application before Board - Members not notified or attending meeting - Union treating members as "members awaiting contract coverage" without full rights of active members, including right to vote on merger resolution - Employer alleging union's failure to inform Board of circumstances surrounding merger resolution constitution misrepresentation and fraud - Majority rejecting allegations - Information not material change or relevant to exercise of Board's discretion - Local union continuing in existence - Members meeting statutory definition - Application dismissed

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *G. O. Shamanski* and *R. Wilson*.

APPEARANCES: *Joanne L. McMahon* and *Ronald Springall* for the applicant/complainant; *Michael Gordon* and *Howard Wood* for the respondent; *Michael Horan* and *Donna Baydak* for the objectors.

DECISION OF KEN PETRYSHEN, VICE-CHAIR, AND BOARD MEMBER R. WILSON;
January 31, 1990

1. This is an application for certification. By decision dated December 22, 1987, the Board (*G. O. Shamanski* dissenting), pursuant to section 8 of the *Labour Relations Act*, certified the United Food and Commercial Workers International Union, Local 206 ("Local 206") as the bargaining agent for a bargaining unit of Knob Hill Farms Limited ("Knob Hill") employees. By letter dated January 4, 1988, Knob Hill applied for reconsideration of this decision, and for reasons set out in a decision dated March 2, 1988, the Board declined to reconsider its December 22, 1987 decision. The Board now has before it a further request for reconsideration by Knob Hill which was made on its behalf by counsel in a letter dated November 14, 1988. In addition to this further request from Knob Hill, the Board has before it requests for reconsideration from Local 206, the United Food and Commercial Workers International Union, Local 175 ("Local 175") and the United Food and Commercial Workers International Union ("the UFCW"). As reflected in a decision dated October 24, 1989, the Board decided at a hearing on August 29, 1989 that it would proceed first with Knob Hill's request for reconsideration. We note that counsel acting on behalf of the trade unions took the position that their requests for reconsideration would only be advanced if Knob Hill's request succeeded. Counsel for the trade unions indicated that they would be seeking leave to withdraw their requests if Knob Hill's request was dismissed.

2. Subsequent to receiving Knob Hill's request dated November 14, 1988, the Board received extensive written submissions from the parties. The Board entertained Knob Hill's

request for reconsideration at a hearing held on August 29 and November 2 and 3, 1989. Knob Hill placed before the Board extensive documentation and on November 2 and 3, 1989 called a number of witnesses to give evidence. The Board entertained submissions from the parties during the afternoon of November 3, 1989. In dealing with Knob Hill's request for reconsideration, the Board has considered the parties' written submissions, the documentary evidence, the oral evidence and the parties' oral submissions.

3. In order to describe the context in which Knob Hill's reconsideration request arises, we will briefly refer to the relevant events. Local 206 applied for certification as bargaining agent for a bargaining unit of employees of Knob Hill at Oshawa on May 23, 1986. The application was opposed by Knob Hill and a group of employees represented by Donna Baydak. The application was heard over the course of 14 days of hearing in the period from August 5, 1986 to February 19, 1987. Local 206 was represented during the course of this proceeding by the firm of Ahee & Associates. As noted above, the Board's decision certifying Local 206 pursuant to section 8 of the Act issued on December 22, 1987.

4. While Local 206's application for certification was before the Board, certain developments occurred within the UFCW. For our purposes, we find it unnecessary to set out these developments in detail in this decision and note that they are referred to extensively in *Knob Hill Farms Limited*, [1989] OLRB Rep. Feb. 149. Suffice it to say that there had been discussions for a number of years within the UFCW to merge a number of the Ontario locals of the trade union. In May 1986, the International's President and the International's Secretary-Treasurer wrote to the Secretary-Treasurer of Local 206 granting Local 206 permission to enter into merger discussions with Locals 175, 409 and 486. Along with the letter was enclosed a document referred to as the "UFCW merger procedure". One of the steps to be followed by UFCW's chartered bodies contemplating merger as set out in this document is that the charter and seal of the chartered body going out of existence shall be surrendered to the International Union. On August 8, 1986, the Presidents of Locals 175, 206, 409 and 486 agreed in writing to recommend to their respective Executive Boards that they adopt a merger resolution. The merger resolution was approved at membership meetings, although employees of Knob Hill who had become members of Local 206 were not given notice of and did not attend any such meeting.

5. Given the timing of the ratification of the merger by the local unions, the merger with Local 175 was to become effective on November 1, 1986. Mr. Springall, who was President of Local 206 during the relevant period and who continues to be President of that Local, recognized that it was his obligation after November 1, 1986 to take the steps necessary to accomplish what the merger agreement contemplated. Over a period of time, all the steps but a few have been completed. The assets of Local 206 have been transferred to Local 175. Bargaining rights were transferred for most of Local 206's bargaining units to Local 175. The employees of Local 206 were transferred to Local 175 no later than January 1, 1987. Mr. Springall is the only officer Local 206 has and Local 206 has held no meetings since October 1986. Most significantly, however, Local 206 has not surrendered its charter. Mr. Springall does not intend to surrender the charter until all steps have been taken to give effect to the merger agreement. Local 206 members employed at Knob Hill have not been transferred to Local 175.

6. Subsequent to its decision of December 22, 1987, there have been a number of proceedings before this Board involving Knob Hill and Local 206, which we also find unnecessary to detail. We note that in some of these proceedings Local 175 asserted that it had the bargaining rights for the employees of Knob Hill and that this assertion was supported by Local 206. In the matter we referred to earlier, *Knob Hill Farms Limited*, *supra* (the "second reference"), the Board (R. W. Pirrie dissenting), pursuant to a ministerial reference under section 107(1) of the *Labour Relations*

Act, advised the Minister that he did have the authority to appoint a conciliation officer on the basis of a request from Local 206. In submitting that the Board should advise the Minister he had no such authority, Knob Hill and the objecting employees argued that Local 206 had ceased to exist, that Local 206 was no longer a trade union within the meaning of the *Act* and that Local 206 was not at that time the trade union to which the Board would have thought it was granting exclusive bargaining rights in the decision of December 22, 1987. In response to these submissions, the Board determined that Local 206 did not cease to exist since its charter was neither surrendered nor revoked as contemplated by the UFCW constitution. In arguing that Local 206 was not a "trade union" within the meaning of the *Act*, Knob Hill and the objecting employees referred to its failure to hold meetings, its lack of assets, the significant decrease in its membership and the fact that it had only one officer. In distinguishing between inactivity and non-existence, the Board determined that Local 206 continued to exist as a trade union within the meaning of the *Labour Relations Act*. The Board's response to the third position put to it was as follows:

43. Finally, there was the argument that when it made its request to the Minister, Local 206 was not the trade union the Board certified or thought it had certified in December 1987. This argument turned also on the changes in assets and numbers of members which Local 206 had undergone between the time it applied for certification and the time it applied to the Minister for an appointment of a conciliation officer. There is no suggestion that there is some other entity which is the same organization as was certified by the Labour Relations Board in December of 1987. The argument seems to be that to be and remain certified a trade union must not only continue to exist but must maintain the size and wealth it had when it applied for certification. The *Labour Relations Act* places no such limitation on the continuation of a trade union's bargaining rights. Indeed, the whole thrust of the *Act* is that the continuation of a trade union's bargaining rights for a bargaining unit is something which is ultimately determined by the employees in *that* bargaining unit. It would be inconsistent with that perspective that a trade union could lose bargaining rights for employees of one bargaining unit because it had lost (or, perhaps, gained) bargaining rights in a number of other bargaining units because of the wishes of the employees in those other units.

44. The fact that Local 206 intends ultimately to go out of the business of representing employees does not affect its current right to represent the employees in the subject bargaining unit. It has not abandoned its right to represent employees in that unit, nor has it abandoned its obligations in that regard. It has not gone out of existence as a trade union and it does not intend to go out of existence so long as it continues to have bargaining obligations.

In determining that the Minister did have authority to appoint a conciliation officer at Local 206's request, the Board concluded in summary that "at the time it made its request to the Minister, Local 206 continued to exist as a trade union with the bargaining rights which had been conferred on it by the Board in December of 1987 with respect to the employees of Knob Hill Farms".

7. Local 206 argued that Knob Hill's request for reconsideration was untimely and that this in itself should cause the Board to dismiss its latest reconsideration request. Counsel for Local 206 submitted that Knob Hill had knowledge of the facts upon which its reconsideration request was based months before it applied for reconsideration as a result of disclosures made by Local 206 in other proceedings before the Board. In reviewing the timing of events relied upon by Local 206 in support of its timeliness objection, we are not satisfied that the circumstances before us concerning any delay on the part of Knob Hill in making its latest reconsideration request should cause us to dismiss this request.

8. The position of Knob Hill can be summarized as follows. It appears that part of its request for reconsideration was initially based on the proposition that Local 206 ceased to exist. In a written submission prior to the hearing in early November 1989, and at that hearing, Knob Hill advised the Board that it does not dispute the existence of Local 206 in this proceeding. Counsel for Knob Hill characterized the reconsideration request in essence as an application under section

58 of the *Labour Relations Act*. That section provides that the Board may declare at any time that a trade union no longer represents employees in a bargaining unit if a trade union has obtained a certificate by fraud. Counsel argued that by applying for certification, Local 206 represented to the Board that it intended to represent the employees of Knob Hill in collective bargaining. Counsel submitted that if any material change occurred while a matter was before the Board, there was an obligation on a party to advise the Board accordingly. The internal union developments in 1986 and the fact that at least by August 1986 Local 206 intended to merge with Local 175 are matters which counsel argued should have been brought to the Board's attention by Local 206 or its counsel as soon as possible and certainly no later than December 22, 1987, the date when the Board issued its decision. It is argued that the failure of Local 206 or its counsel to bring these facts to the Board's attention deprived the Board of the opportunity to satisfy itself with respect to certain matters. The failure to disclose material facts, such as Local 206's capacity and desire to bargain, amounts to fraud since it is submitted that a failure to disclose where there is an obligation to do so constitutes a misrepresentation, which in the circumstances also constitutes fraud. Counsel argued that the failure of Local 206 or its counsel to disclose material facts resulted in the Board not having before it relevant information which would impact on the way in which the Board exercised its discretion. Counsel noted that there was no direct evidence that the firm Ahee & Associates had any direct knowledge of the merger, but submitted that the rumours which Mr. Ahee heard concerning a merger should have caused him to make an inquiry, which in turn, should have resulted in certain disclosures being made to the Board.

9. During the course of Mr. Springall's evidence before us, he referred to the rights of MACC's (members awaiting contract coverage). Over the objection of Local 206's counsel, the Board allowed Mr. Horan, acting for the objecting employees, to ask certain questions about MACC's and to make certain submissions relating to this evidence. Mr. Springall testified that the concept of MACC's is not provided for in either the UFCW constitution or Local 206's by-laws, but was a procedure used by Canadian locals of the UFCW. MACC's do not pay dues and do not have all of the rights of those members who are covered by collective agreements and who pay dues. MACC's can vote to ratify or strike with respect to their own employer but are not permitted to vote concerning other Local issues. It was for this reason that Local 206 members employed at Knob Hill were not notified of the meeting called to approve the merger resolution.

10. Counsel for the objecting employees noted that the evidence disclosed that the subject of the quality of membership did not arise during the Local 206 organizing campaign at Knob Hill so that one could not argue that Local 206 misrepresented to the Knob Hill employees what status they would have as members. However, counsel argued that the concept of MACC's is not given any constitutional foundation within the UFCW. As well as not being members in a constitutional sense, the employees at Knob Hill who signed Local 206 membership cards are qualitatively in an inferior position when compared to active members. Counsel argues that even if they are members, this latter factor should have an impact on how the Board exercises its discretion under section 8 of the Act.

11. In determining the issues before us, we turn first to the argument made on behalf of the objecting employees. Member and membership is defined in section 1(1)(l) of the *Labour Relations Act* as follows:

1.-(1)(l) "member", when used with reference to a trade union, includes a person who,

- (i) has applied for membership in the trade union; and
- (ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and "membership" has a corresponding meaning.

The Board was satisfied at the time and continues to be satisfied that Local 206 filed membership evidence which conformed with the Act's definition of "member". On the basis of the evidence before us, including the membership evidence filed by Local 206, the Board determined that the pre-conditions to section 8 relief had been met and exercised its discretion to certify Local 206 pursuant to that section. At the time it issued its decision on December 22, 1987, the Board was unaware that Local 206 treated the employees who signed Local 206 membership cards as MACC's. After considering the submissions of counsel for the objecting employees, the Board is satisfied that the evidence before us relating to the MACC's does not affect our determination that the pre-conditions to section 8 have been met, nor does it cause us to exercise differently our discretion under that provision. The Board's finding with respect to membership is made in order to ascertain what percentage of employees in the bargaining unit desire a particular trade union to represent them in collective bargaining. Given the Act's definition of member, it is unnecessary to determine whether a person is a member according to the trade union's constitution or, given the circumstances in this case, what quality of membership a person will enjoy. The Board is satisfied that at all material times the persons on whose behalf Local 206 filed membership evidence were members of Local 206 within the meaning of section 1(1)(l) of the Act. Having considered the representations of the objecting employees to be a request for reconsideration, that request is denied for the above reasons.

12. In responding to Knob Hill's request for reconsideration, we note that the documentary material, the oral evidence and the submissions lead us to adopt the same conclusions as the majority of the panel of the Board that decided the second reference. The Board finds that at the time it certified Local 206 on December 22, 1987, Local 206 had not ceased to exist (a matter which no party takes issue with in this proceeding), and it had not ceased to be a trade union within the meaning of the *Labour Relations Act*. Knob Hill's reconsideration request is based on facts which came to its attention subsequent to the certification decision and it argues that these facts should have been brought to the Board's attention by Local 206 or Ahee & Associates. Having the benefit of these additional facts before us, the Board concludes that they would not alter the determinations made by the Board in its decision of December 22, 1987. Since Local 206 continued to exist as a trade union on December 22, 1987 and at all relevant times, the additional information does not affect our conclusion that the pre-conditions of section 8 have been met, nor does it alter our conclusion that the circumstances warranted the exercise of our discretion to certify Local 206 pursuant to section 8 of the Act.

13. Knob Hill's argument in support of its position that Local 206 and/or Ahee & Associates are guilty of fraud within the meaning of section 58 of the Act is based on the proposition that material changes in circumstances occurred which obliged Local 206 and Ahee & Associates to disclose certain facts to the Board. Given that the additional facts were not material, as they would not have changed the result in the certification decision, we do not accept the assertion that Local 206 or its counsel had an obligation to disclose them to the Board. Further, and in any event, the material and evidence does not support the conclusion that Local 206 or Ahee & Associates are guilty of fraud. In our view, the only representation one can infer from the fact that Local 206 applied for certification is that Local 206 desired the bargaining rights for the employees of Knob Hill. The fact that Local 206 or its solicitor did not advise the Board prior to the certification decision that Local 206 intended to merge with Local 175 and intended that this merged Local would bargain for the Knob Hill employees does not lead to the conclusion that there has been a misrepresentation which in turn can be characterized as fraudulent. The facts before us, particularly the evidence of the trade union officials called to testify, do not disclose an intent on the part of Local

206 or its solicitor to deceive the Board. Accordingly, Knob Hill's application for reconsideration is dismissed, as well as its application under section 58 of the Act.

14. In December 1988, a petition was filed with the Board by the objecting employees. On March 1, 1989, in an endorsement, the Board indicated that it had some difficulty in appreciating the basis upon which it should give the petition any weight given the stage of the proceedings. In the endorsement, the Board also indicated that it would give the parties the opportunity to make representations concerning the petition when the reconsideration requests were heard. When the reconsideration requests were heard, the Board invited the parties to make representations concerning the December 1988 petition if they so desired. In effect, no party wished to make any such representation. Counsel for the objecting employees simply noted that the petition was another indication that certain bargaining unit employees did not want Local 206 to represent them. The Board is satisfied that the petition filed by the objecting employees in December 1988 is untimely and irrelevant given the stage of the proceedings at which it was filed (see section 73 of the Board's Rules of Procedure). Accordingly, the petition will be given no weight.

15. Having regard to the disposition of Knob Hill's request for reconsideration, the reconsideration requests of the trade unions referred to in paragraph 1 of this decision are withdrawn with leave of the Board.

DECISION OF BOARD MEMBER G. O. SHAMANSKI; January 31, 1990

1. I dissent.

2. From the evidence adduced at the hearing of this matter it was clearly established that on *August 6, 1986*, the Presidents of Local 175, 206, 409 and 486 agreed in writing to recommend to their respective Executive Boards that they adopt a merger resolution with respect to creating one large Local namely Local 175.

3. It should be noted at this juncture that certification proceedings before the Board were being heard.

4. The fact that Local 206 officials or its solicitors did not advise the Board prior to the certification decision that Local 206 intended to merge with Local 175 and that this merged Local would bargain for Knob Hill employees does in my opinion equate to misrepresentation and deception on the Board which is *tantamount* to fraud.

5. Accordingly, I would allow the company's application for reconsideration and in accordance with section 58 of the Act declare that Local 206 no longer represents the employees of Knob Hill.

0142-88-U; 2800-87-U Robert McIntyre, Complainant v. United Steelworkers of America, Local 14045, Respondent v. Zalev Brothers Limited, Intervener; Robert McIntyre, Complainant v. United Steelworkers of America, Local 14045, Respondent v. Zalev Brothers Limited, Intervener

Arbitration - Duty of Fair Representation - Judicial Review - Unfair Labour Practice - Bargaining unit members petitioning union to seek judicial review of arbitration decision - Union declining to seek review - Refusal based solely on legal opinions on chances of success - Board applying same standard as to decision whether to arbitrate a grievance - Union not obliged to seek review even if review supported by unit members - Union not obliged to seek review where chance of success - Union entitled to refuse on merits in context of other considerations grounded in union's role as exclusive bargaining agent and collective bargaining - Union failure to explain reasons not breach of duty - Complaint dismissed

BEFORE: *S. A. Tacon*, Vice-Chair, and Board Members *W. A. Correll* and *R. Montague*.

APPEARANCES: *Gary McLister* and *Robert McIntyre* for the complainant; *Brian Shell* and *John Spriggs* for the respondent; *Jeffrey M. Slopen* for the intervener.

DECISION OF THE BOARD; February 22, 1990

1. By decision of the Board dated July 6, 1989, the Board directed the Registrar to list for hearing the above complaints, as limited by the Board's decision.
2. When the matter next came on for hearing, the Board heard the evidence, in the form of an agreed statement of facts and documentary material, and the submissions of the parties and gave the following oral ruling:

The Board has considered the evidence and submissions of the parties and regards it as appropriate to give its decision orally. The Board's decision will be issued subsequently in written form.

It is useful to first set the context for the section 68 complaints as they now stand. In its decision of July 6, 1989, *inter alia*, the Board demarcated the limits of the evidence which may be led with respect to the various allegations as set out in the two complaints (filed in January 1988 and April 1988). The complaints, as so restricted, concerned the allegation that the union's decision not to proceed to judicial review of the Hinnegan arbitration award was contrary to section 68 of the *Labour Relations Act*. Beyond the text of the January 1988 complaint, what the Board referred to as section (a) of the April 1988 complaint and the last sentence in section (e) of the April 1988 complaint (solely in connection with the judicial review application), further evidence was not to be permitted.

The parties then agreed to a number of facts and, beyond this, chose to call no evidence. Those agreed facts are as set out in paragraph 4 (items (a) through (j)) of the July 6, 1989 Board decision. Further, the parties agreed as follows:

1. The bargaining unit members prepared a petition signed by

20 people in the bargaining unit to proceed to judicial review.

2. The petition was given to Joe Ginty, a USWA staff representative.
3. As a result, the local union executive was aware that the Zalev bargaining unit wanted the Hinnegan award to go to judicial review.
4. The union's lawyer (Mr. Nicholson) told the grievors that, in his opinion, Mr. Hinnegan was an arbitrator who favoured companies [in this regard, note the reference in paragraph 4(j) of the July 6 Board decision].
5. Mr. Nicholson told the grievors this before the arbitration hearing and argued at the hearing that Mr. Hinnegan had a pro-company reputation.
6. Mr. McIntyre had an apprehension of bias and, afterwards, he felt he did not have a fair hearing.
7. The local union executive requested legal opinions about proceeding to judicial review of the Hinnegan award.
8. Following receipt of legal opinions from Mr. Nicholson and Mr. Shell (exhibits 2 and 3 respectively), the local union executive decided not to go to judicial review.
9. This decision was reported to the membership of Local 14045 at a membership meeting on March 24, 1987.

Finally, the Board notes the parties' agreement that documents filed as exhibits with respect to the July 6 decision were properly before the Board in connection with the section 68 complaint as it proceeded to hearing on the merits.

The Board does not regard it as necessary to set out the submissions of counsel herein.

In reaching its decision, the Board has considered the agreed facts (paragraph 4 of the Board decision of July 6 and the facts as noted above) and the documentary material, having regard to the parties' submissions and the jurisprudence.

In this latter respect, the Board notes that counsel did not disagree on the jurisprudence of the Board with respect to the duty of fair representation. Rather, counsel disagreed on the application of that jurisprudence to the facts before the Board in the instant complaint. The Board, as well, adopts the reasoning and principles expressed in the jurisprudence including, for example, the cases referred to by counsel for the union.

The Board must scrutinize the decision of the local union executive not to

proceed to judicial review to assess whether that decision was arbitrary, discriminatory or in bad faith, whether that decision flowed from consideration of irrelevant factors including ill will directed against the complainant.

In the Board's view, that assessment should utilize the same standards developed with respect to a union decision not to proceed to arbitration. In this instance, the Board need not conclusively resolve whether there are additional policy considerations which may properly motivate a union in deciding whether to go to judicial review as distinct from proceeding to arbitration. In short, the union must have put its mind to the specific circumstances of each case but, if it does so honestly and in good faith, the union need not be "correct" in that decision.

In the instant case, the complainant was discharged from his employment at the company for actively participating in an illegal strike. That discharge (and those of several other grievors) was challenged at arbitration. However, the arbitrator upheld the terminations. The members of the bargaining unit expressed their view (through a petition signed by 20 such persons) that the arbitration decision should be challenged on judicial review. The local union executive did not accede to that view. Rather, the local union executive sought and received two legal opinions (dated February 25, 1987 and March 13, 1987) concerning the prospects for success at judicial review. The union executive then decided not to proceed with a judicial review application. That decision was announced at a local union membership meeting on March 24, 1987.

There are no facts before this Board to suggest that the decision of the local union executive was based on other than the substance of the legal opinions. The references in the agreed facts to other proceedings (including the injunction and section 92 applications) are not sufficient to support the assertion of the complainant's counsel that the union's past relationship evinced a lack of concern for the complainant and, therefore, was in contravention of section 68. There is no suggestion (or evidentiary basis) that the union representation provided at the arbitration hearing itself was in any way deficient. That the complainant felt he did not have a fair hearing from Mr. Hinnegan in no way taints the quality of the union representation at that level.

In the Board's view, the union was clearly entitled to seek legal advice in reaching its decision. That the union need not necessarily seek such advice has also been noted in the jurisprudence. The advice, in the Board's opinion, placed the chance of success at judicial review as slim to non-existent. Even the "slim" hope held out by Mr. Nicholson was predicated on successfully persuading the court to extend the *dicta* expressed in dissent in a Supreme Court of Canada case.

The Board is not here deciding upon the correctness of the legal opinions nor, more importantly, need the Board determine the "correctness" of the decision of the local union executive to rely on the legal opinions. As stated earlier, the applicable test is one of "reasonableness" not "correctness".

Counsel for the complainant submitted that the union is obliged to proceed to judicial review if a legal opinion indicates there is even a "chance" of suc-

cess and not to so proceed contravenes the duty of fair representation. Further, counsel argued that the union was obligated to follow the wishes of the membership as expressed in the petition.

The Board disagrees with both propositions. The jurisprudence has not held the union to be the guarantor of every grievance whether or not the grievance is supported by other bargaining unit members and/or union members. To require the union to so act would be to ignore the representative capacity of the union - the union acts in its own right as exclusive bargaining agent and not as "delegate". Nor may the union be required to act if the prospects for success are "slight". Indeed, the prospects for success may even be better than "slight" and the union may yet refuse to act provided it turns its mind to the merits of the specific case in the context of other considerations grounded in the union's role as exclusive bargaining agent and collective bargaining.

Counsel for the complainant also contended that the union did not explain its reasons for its decision not to go to judicial review to the bargaining unit members and/or the union members and, thereby, violated section 68. The agreed facts note that the decision not to file a judicial review application was reported to Local 14045 membership at a membership meeting on March 24, 1987. While such an explanation might have made the decision more palatable to the members, that conduct is not required of a union in order to comply with the section 68 duty. It is the *decision* of the union to act or not to act in a specific way and the *reasons* for that decision which must not be arbitrary, discriminatory or in bad faith.

In the Board's view, the local union executive turned its mind to the question as to whether to proceed to judicial review and reached its decision after considering the legal opinions which (at best) held out minimal prospects for success. That process cannot properly be described as arbitrary, discriminatory or in bad faith.

For the foregoing reasons, then, the Board finds that the complainant has not established that the union contravened section 68 in its decision not to proceed to judicial review of the Hinnegan arbitration award.

Accordingly, these complaints are dismissed.

1078-88-JD International Association of Bridge, Structural and Ornamental Ironworkers, Local 721, Complainant v. **Newmarch Inc.** and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463, Respondents v. Millwright District Council of Ontario, on its own behalf and on behalf of Local 2309, Intervener

Construction Industry - Jurisdictional Dispute - Handling and installation of Hollywood Rail, Loudon Rail, and support steel - Board considering collective bargaining relationships, skill and training, economy and efficiency, employer practice, area or industry practice, and employer preference - Board rejecting "end use" as appropriate consideration - Board directing work to be assigned to Ironworkers and Millwrights

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *J. Lear* and *F. Kelly*

APPEARANCES: *Maurice A. Green*, *Dan McCarthy* and *Aaron Murphy* for the complainant; *Walter Thornton*, *Joe Liberman* and *Ross Bannerman* for the respondent, Newmarch Inc; *A. J. Ahee* and *C. Burrows* for the respondent, United Association; *N. L. Jesin*, *Jim Griffin* and *H. Caruthers* for the intervener

DECISION OF THE BOARD; February 22, 1990

1. This is a complaint under section 91 of the *Labour Relations Act* wherein the complainant has requested that the Board issue a direction with respect to the assignment of certain work.
2. The Board heard the evidence and representations of the parties during fifteen days of hearing over a span of approximately seven months. The protracted span of the hearing was in large part due to the fact that the parties agreed to adjourn five of the fifteen days originally scheduled on agreement of the parties at the pre-hearing conference in this matter.
3. The parties, with the exception of the respondent employer, Newmarch Inc. ("Newmarch") participated in a pre-hearing conference in respect of this matter before another panel of the Board. Newmarch did file a brief with the Board and initially appeared at the first two days of hearing. On April 13, 1989 however, Newmarch withdrew as a participant at the hearing. In so doing, counsel for Newmarch stated that Newmarch would accept whatever decision this Board would make. Counsel further stated that, although Newmarch would not call any evidence or make any submissions in respect of any of the issues raised in this application, any representative of Newmarch who was properly subpoenaed by another party to these proceedings would attend and testify as required. In fact, Mr. Ross Bannerman, Vice-President of Newmarch, was subpoenaed by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 ("the UA") and did testify. Upon agreement of the parties, on April 13, 1989, Newmarch filed an addendum to its reply which states:

At the time that the work in dispute was assigned, the Employer took the position that the work in dispute involving hollywood rail did not involve a conveyor.

The evidence called by the Complainant on April 12, 1989, given by William J. Olsen, included that the operation or system in question could be considered as a conveyor.

At all material times, the Employer has been aware that there is a difference of opinion on this point and the Employer acknowledges the evidence of Mr. Olsen as a reasonable opinion or characterization.

4. Notwithstanding its withdrawal as a participating party to these proceedings, Newmarch continued to be notified by the Registrar of the continuation dates and correspondence received by the Board in these proceedings in the same manner as the other parties.

5. The Board received extensive and detailed *viva voce* and documentary evidence. We do not propose to set out all of that evidence. Our findings of facts herein have been derived from the totality of that evidence and on the basis of such facts as were agreed upon by the parties before this Board and/or in the pre-hearing conference.

Work in Dispute

6. The general nature of the dispute involves the unloading, handling and installation of "tool rail" and "tool steel" or "support steel". Various witnesses used either the term "tool steel" or "support steel" and on occasion used these terms interchangeably. From the totality of the evidence, it is clear that, whenever used, both terms refer to that steel which is attached to the structural steel of the building and from which the tool rail in dispute is hung. The evidence further disclosed that typically a number of other items such as conveyors, pipes, lights, fans, etc. are also suspended from this steel. For ease of reference, we will refer to the angle iron, I-Beams, channel iron, headers, hangers, bracing and generally any of the miscellaneous steel which together make up this "tool steel" or "support steel" as "support steel".

7. More specifically, the work in dispute as set out in the pleadings of the parties and the pre-hearing brief (with which the parties agreed) involves work performed under a contract awarded to Newmarch by General Motors ("G.M."). The work was performed at the G.M. plant in Oshawa. The work was assigned by Newmarch on July 12, 1988 and involves three parts.

8. First, the unloading, handling and installation of Hollywood Rail. Hollywood Rail is a generic name given to a type of tool rail fabricated in this case by the contractor from Schedule 40 pipe and flat bar. In this assignment, Hollywood Rail was suspended from, or attached to, the support steel. The Hollywood Rail itself is used as a support system for tools. In this case, the parties agreed both pneumatic and non-pneumatic tools would be suspended from the Hollywood Rail. The Hollywood Rail does not itself carry pressurized air. Generally, Hollywood Rail has suspended from it both pneumatic and non-pneumatic tools and equipment and, on occasions, trays of small parts. All of these items are used by the G.M. production employee in the production process.

9. In this case, Newmarch assigned the unloading, handling, and installation of Hollywood rail to the UA. The applicant, International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 ("Ironworkers") and the intervener, Millwright District Council of Ontario, on its own behalf and on behalf of Local 2309 ("Millwrights") take the position that Hollywood Rail is a "conveyor" and should have been assigned to a composite crew of Ironworkers and Millwrights pursuant to an agreement between their respective International unions ("the conveyor agreement"). The Ironworkers and the Millwrights have agreed that, if we find that the work was improperly assigned to the UA and should have been assigned to a composite crew, the Board need not interpret that conveyor agreement or decide on the exact composition of the crew. That is a matter which the Ironworkers and Millwrights have indicated they can determine between themselves. It was the assignment of the Hollywood Rail to the UA which is at the heart of this jurisdictional dispute and to which the parties addressed both the major portion of their evidence and submissions.

10. The second portion of the work involves the unloading, handling and installation of Loudon rail. Loudon Rail is also attached to or suspended from the support steel. The Ironworkers

and Millwrights take the position that Louden Rail is a conveyor and should have been assigned to a composite crew of Ironworkers and Millwrights pursuant to the conveyor agreement. In this case, the unloading, handling and installation of the Louden Rail was assigned to the Millwrights.

11. The third part of the work in dispute is the support steel itself. The support steel is the support framework for *inter alia*, the tool rail. More specifically, in this case, it supports the Hollywood Rail, Louden Rail, pipe, conduit, lighting and fans. In the assignment, the support steel was assigned to a 50/50 composite crew of UA members and Ironworkers. The Ironworkers and Millwrights each take the position that it should have been assigned to a composite crew of Ironworkers and Millwrights.

Louden Rail

12. At the hearing, the UA did not dispute the assignment of the Louden Rail to the Millwrights. Neither did it dispute the assignment of the support steel which supports that Louden Rail, the *sole* purpose of which is to support the Louden Rail to the other trades. Counsel for the UA did not however, concede that Louden Rail was a conveyor.

13. In view of the respective positions of the parties, and the agreement of the Ironworkers and Millwrights that if we determine the conveyor agreement to be applicable to this work, we need not determine the exact composition of the composite crew, we find it appropriate to deal with this aspect of this jurisdictional dispute at this stage.

14. Having regard to the evidence, we find that Louden Rail is a pre-purchased, pre-manufactured conveyor system which, in this instance was supplied to Newmarch by G.M. "Louden" is a manufacturer's name. This type of conveyor rail is generally used to convey heavier loads. It is therefore manufactured of heavier steel than, for example, the Hollywood Rail. In this case, the Louden Rail consisted of six-inch (6 inch) I-beams. We find that as the Louden Rail is a conveyor, it should properly have been assigned to a composite crew of Ironworkers and Millwrights in accordance with the conveyor agreement.

Criteria to be considered

15. In assessing the merits of a jurisdictional dispute in the construction industry, the Board has traditionally looked to a number of criteria which may be itemized as follows:

- (a) collective bargaining relationships,
- (b) skill and training,
- (c) consideration of economy and efficiency,
- (d) employer practice,
- (e) area or industry practice,
- (f) employer preference.

(See, *Spruce Falls Power & Paper Company Limited*, [1988] OLRB Rep. July 708, *Anchor Shoring Ltd.*, [1974] OLRB Rep. Aug. 528, *Boise Cascade Canada Ltd.*, [1979] OLRB Rep. Sept. 850, *Southam Murray Printing*, [1984] OLRB Rep. June 868, *Premier Pipelines Ltd.*, [1988] OLRB Rep. Oct. 1068 and *Toronto Star Newspapers Ltd.*, [1980] OLRB Rep. April 565). In this instance, the parties in their submissions referred to each of these six criteria.

Collective Bargaining Relationships

16. Newmarch has a collective bargaining relationship with each of the UA, Millwrights, and Ironworkers. In its relationship with the UA, Newmarch is bound to the collective agreement between the Mechanical Contractors Association Ontario and the Ontario Pipe Trades Council of the United Association. That collective agreement has a trade or work jurisdiction clause which provides:

9.1 The parties to this Agreement recognize that it is the employers' sole responsibility to assign work. The contractor shall not assign work contrary to existing area practices predicated on jurisdictional wording outlined in other trade Collective Agreements. The reference herein, to area practices and/or jurisdictional awards must be area practices and/or awards that have been accepted and practiced on projects between Unions.

• • •

9.3 Subject to the conditions contained in Clause 9.1 and 9.2 above, and subject to jurisdictional Agreements between trades, decisions of record and local area practice, this Agreement covers the unloading distribution and hoisting of all equipment and piping for plumbing and/or pipe fittings systems, and the fabrication installation and handling of all plumbing pipe fitting and industrial process control systems including all hangers and supports. Where no work claim dispute exists, the original assignment of the above works shall be to the UA.

17. In its relationship with the Millwrights, Newmarch is bound to the collective agreement between the Association of Millwright and Contractors of Ontario Inc. and the Millwrights District Council of Ontario. That collective agreement has a trade jurisdiction clause which contains, *inter alia*, a claim to the installation of conveyors and mono rails.

18. In its relationship with the Ironworkers, Newmarch is bound to the collective agreement between the Ontario Erectors Association, Incorporated and the International Association of Bridge, Structural and Ornamental Ironworkers and the Ironworkers District Council of Ontario. That collective agreement contains, *inter alia*, the following provisions relating to the trade jurisdiction of the Ironworkers.

(a) The field fabrication, erection, installation, welding, demolition, revision, repair and dismantling of all structural and miscellaneous steel, header steel, bridging steel, all supports including but not limited to pipe supports, electrical supports, duct supports and like structural members, prefabricated or fabricated on, during and/or after the completion of the job ...

(c) The rigging, moving, handling, dismantling, assembling, placing and repair of all machinery and equipment including the erection, installation, and dismantling of conveyors, mono rail and overhead cranes.

19. There is no specific reference in any of these collective agreements to Hollywood Rail. The Ironworkers and Millwrights have sought to characterize the work in dispute, most notably the Hollywood Rail itself, as work which involves the installation of a conveyor. If we accept such characterization, then these collective agreements, (as well as the appropriate constitutions of each of the three trade unions) favour an assignment of the work to the Ironworkers and Millwrights.

20. Counsel on behalf of the Millwrights and Ironworkers each asserted that the Hollywood Rail fell in the same category as Loudon Rail. Although the length of rail, its weight and perhaps even the material used in the fabrication of the Loudon Rail may be different than the Hollywood Rail, fundamentally, the Hollywood Rail and Loudon Rail perform the same purpose and have the same use. Each transports material from one point to another either manually or mechanically. It was submitted that the movement of goods, parts, equipment or tools from point A to point B

characterize both the Hollywood Rail and Loudon Rail as conveyors. It appears to be well settled throughout the industry that Loudon Rail is a conveyor. Counsel for the Millwrights and Ironworkers therefore argued that if Loudon Rail is a conveyor, and there is no difference in the purpose or use of the Loudon Rail and Hollywood Rail (each transports "things") then the Hollywood Rail must also be considered to be a conveyor.

21. We find that we need not determine whether Hollywood Rail is or is not a conveyor. It is clear from the evidence that within the construction industry there is a divergence of opinion on this matter. There is not a clear consensus as to the correct definition of a "conveyor", or whether Hollywood Rail falls within that definition. As we have determined that it is unnecessary for us to label the Hollywood Rail as either being or not being a conveyor, we do not do so.

22. After a review of the totality of each of the three collective agreements and the respective constitutions of the three trade unions, we find that, although the criteria of collective bargaining relationship does not *clearly* favour any of the three trade unions (insofar as each trade union can point to *some* provision in its collective agreement upon which to base its claim) the work in dispute falls more closely within the trade jurisdiction claimed by the Ironworkers and Millwrights than the jurisdiction claimed by the UA.

Skill and Training

23. There is no evidence before us to suggest that the members of any trade union are more skilled, have acquired better training, or are more able to perform the work in dispute. Generally speaking, this criterion does not favour any one of the UA, Millwrights or Ironworkers, because it cannot be said that the skills required relate clearly, or primarily, to those of one trade and not the others.

Economy and Efficiency

24. We are unable to determine if this factor favours the assignment of the work in dispute to a particular trade union because of the complete absence of any evidence in respect of this criterion. Although counsel for the UA made certain submissions in respect of this criterion in terms of "continuity of work", those submissions were not supported by evidence. We do not consider it appropriate to consider the criterion of economy and efficiency in the abstract. (*Premier Pipelines, supra, K-Line Maintenance*, [1979] OLRB Rep. Dec. 1185, *Boise Cascade*, [1983] OLRB Rep. Feb 194).

Employer Preference and Employer Practice

25. We have considered these two factors together because, in the circumstances of this case, they are closely related. Counsel for the UA argues that both these factors favour an assignment of work to the UA. He submits that in both this disputed assignment and a previous assignment involving substantially similar work, Newmarch assigned the Hollywood Rail to the UA and the support steel to a 50/50 composite crew of Ironworkers and UA. It was asserted that those assignments indicate both the employer's own past practice and the employer's preference.

26. There is no dispute that, in December 1986 Newmarch assigned work which was substantially similar to the work in dispute in the same manner as it did in the July 1988 assignment which forms the basis of this complaint. Moreover, the work in December 1986 also occurred at the G.M. plant in Oshawa.

27. The evidence discloses that after the December 1986 assignment, representatives of

both the Ironworkers and Millwrights expressed their dissatisfaction and disagreement with that assignment. A number of meetings between Newmarch and representatives of the Ironworkers and Millwrights occurred. Mr. Murphy of the Ironworkers testified that after the 1986 assignment he wrote to Newmarch on January 5, 1987 and complained about the assignment. He also had numerous meetings with Newmarch officials. On March 25, 1987, he sent a telex to Mr. Bannerman at Newmarch which states:

... Be advised that we hold you in violation of our collective agreement in particularly [sic] Article 1 in that the company has assigned work belonging to Ironworkers to another trade, suggest we meet under Article 24 of our collective agreement on Friday March 27, 1987 at 10:00 am at 1604 Bloor Street West Toronto. Please confirm by return wire.

28. Thereafter a further meeting occurred. Mr. Murphy testified that, at this meeting, representatives of Newmarch indicated that the work in dispute was a new venture for Newmarch, and that in future the work would be assigned differently based on the evidence which the company received. Mr. Murphy understood this to mean that future assignments would go to the Ironworkers and Millwrights. As a result, and in view of the fact that the work was nearly complete, Mr. Murphy determined not to pursue the grievance, did not file a jurisdictional dispute, and decided to "write it off as a bad experience".

29. Mr. Carruthers of the Millwrights in his evidence stated that he also expressed his disagreement with the December 1986 assignment on several occasions to various representatives at Newmarch. Mr. Carruthers testified that Mr. Bannerman advised him that this job assignment was a "one shot deal and in future if [he] did any Hollywood Rail on that site it would not be done in that manner".

30. Notwithstanding the position of the Ironworkers and Millwrights, the December 1986 job was performed in accordance with the original assignment. Although Mr. Bannerman acknowledged that the Ironworkers and Millwrights were unhappy with the assignment and expressed "quite serious disagreement" with it, he testified that Newmarch did not give either the Ironworkers or Millwrights any assurances or make any promises that in future this type of work would be assigned to the Ironworkers and/or Millwrights. Mr. Bannerman confirmed Mr. Murphy's testimony that there was extensive discussion and disagreement about the 1986 assignment. He also acknowledged that prior to 1986 Newmarch had not had a lot of experience with the installation of the work in dispute.

31. In addition to his submissions that these factors favoured an assignment of the work to the UA by reason of employer preference and employer past practice, counsel for the UA also argued that these circumstances indicated the Ironworkers and Millwrights had "sat on their rights" and had failed to proceed with any grievance or jurisdictional dispute complaint. As a result, they were now precluded from complaining that in July 1988 Newmarch improperly assigned the same type of work in the same manner.

32. Counsel for the Ironworkers and Millwrights argued that employer preference could not be given any weight in the circumstances of this case, where the employer had withdrawn from active participation in the hearing. This was particularly true, it was argued, in light of the addendum filed by Newmarch on April 13, 1989 which is referred to in paragraph 3 herein. Counsel also argued that the UA, in its examination-in-chief of Mr. Bannerman, had failed to lead any evidence in respect of the employer preference or such factors as skill, economy and efficiency which traditionally underlie an employer's preference. As noted earlier, the Board does not have any evidence in respect of the economy and efficiency criteria. In this regard, counsel referred to *Premier Pipelines*, *supra* and *Boise Cascade*, *supra*. In *Premier Pipe Lines*, the Board stated:

22. The Board agrees also with Labourers' counsel that the employer preference criterion would not be appropriate in this case. This is because, apart from evidence that there is a letter of understanding between the UA and the Association, which purports to prescribe certain minimum manning levels of UA classifications for the work at issue, the Board has no evidence before it as to the basis of Premier's preference for assigning the disputed work to the UA. Nor is there evidence either of any beneficial impact on the economy and efficiency of Premier's construction operations on the Project from the assignment of the work to the UA, or of any adverse impact from assigning it to the Labourers.

33. Counsel for both the Ironworkers and Millwrights submitted that, in this case, the sparse evidence before the Board as to the basis of Newmarch's assignment of the work to the UA in 1986 did not reasonably or rationally support that assignment. Counsel argued that employer preference should only be considered when it is grounded on some rational basis. Counsel submitted that the prevailing area or industry practice did not support the assignment of the work to the UA. It was submitted that the employer's preference or the 1986 assignment was therefore not grounded on some reasonable or rational basis. Therefore, in the absence of some evidence of skill, economy or efficiency to support the employer's preference or the December 1986 assignment to the UA, neither of these factors should be considered.

34. We propose to address the submissions as to the prevailing area or industry practice which Newmarch considered, or should have considered, in making its 1986 assignment when dealing with the criteria of area or industry practice generally.

35. In respect of the criterion of employer preference, we find that this factor does not favour any one of the three trade unions. There is no evidence before us in respect of the economy and efficiency of the employer's operations upon which the employer's preference can be based. Moreover, during his cross-examination by counsel for the Ironworkers in respect of the December 1986 assignment, Mr. Bannerman was asked "does it make a big difference to you regarding what trade does the work?" He responded "not particularly, we're happy to deal with any trade, although naturally we don't like to have jurisdictional disputes". In view of this evidence, we find that the factor of employer preference does not favour the assignment of this work to any particular trade union.

Area or Industry Practice

36. The Board heard a substantial amount of evidence and argument about this factor. At the commencement of the case, on April 11, 1989, we orally ruled that only evidence of industry practice in Board Area 9 (the area in which the disputed work was performed) would be admitted.

37. There was a significant dispute between the Ironworkers and Millwrights on the one hand, and the U.A on the other, about what evidence of area practice was relevant and should be considered by the Board. The UA adopted the position that the *only* relevant area or industry practice was that practice which related to support steel or Hollywood Rail installed as part of, or in conjunction with, a new type of conveyor system known as the Automatic Guided Vehicle system ("A.G.V. system"). The UA argued that the nature and purpose and the "end use" of support steel and tool rail such as Hollywood Rail, was significantly different when installed as part of the A.G.V. system than the support steel and tool rail installed as part of a "traditional" conveyor system. It was the submission of the UA, therefore, that evidence in respect of the installation of support steel or tool rail, including Hollywood Rail, when installed as part of, or in conjunction with, a traditional conveyor system was irrelevant.

38. Both counsel for the Ironworkers and Millwrights took a position contrary to that of the UA. It was their submissions that there was no difference between the installation of support steel

and tool rail between the A.G.V. system and the “traditional” conveyor system. They asserted therefore that the Board should not limit its consideration of area practice only to installations involving the A.G.V. system, and that the many other instances involving the installation of tool rail and support steel at G.M. were equally relevant.

39. The submissions of counsel for the UA in respect of the appropriate parameters of the area or industry practice are inextricably tied to the UA’s position that it is *now* entitled to the work (while it may not necessarily have been entitled to the work on other, earlier, occasions) because of the advent of “new technology” and the “end use” of the tool rail and support steel caused by that new technology. This is the crux of the UA’s claim and the reason why it has submitted that the only relevant area or industry practice is the practice which relates to this “new technology”. It is therefore useful to elaborate on this aspect of the claim by the UA.

The New Technology

40. The UA claim to the work in dispute arises primarily as the result of the introduction of a new type of conveyor system known as the A.G.V. system at the G.M. plant in Oshawa. Prior to the introduction of the A.G.V. system, the production process at G.M. made use of “conventional” or “traditional” overhead and floor conveyors to move both the vehicles being produced and parts necessary to production. The production process occurred in a traditional “assembly line” fashion where the conveyors used would be of the conventional chain driven, power and free, or electrified monorail type. In such a process, each production operation follows a progressive sequence, which requires employees stationed along the assembly line to perform some work on the vehicle before it passes along to the next stage. Typically, then, this type of assembly line is a “straight-through” process. Parts and materials are also conveyed to the production employees stationed along the assembly line by means of a conveyor.

41. The A.G.V. system introduced at G.M. in the mid-1980’s moved away from this traditional assembly line to a new concept of “work cells”. In this system, the automobile is carried on an electronically controlled vehicle which follows a predetermined path through the workplace responding to impulses from wiring embedded in the floor. Work cells, capable of accommodating five or six vehicles are located in various parts of the plant. As the line of electronically guided vehicles approaches a work cell, each is diverted into one of the five or six bays, where G.M. employees carry out the next stage(s) of the process before sending the vehicles on their way. In areas where the A.G.V. system is used, there are no conventional floor conveyors.

42. In this case, the UA claims the Hollywood Rail because the Hollywood Rail has suspended from it pneumatic tools and the Filter Lubrication Regulator (“F.L.R.”) systems and flex hoses needed to operate those pneumatic tools. The UA claims that, because of the change in the production process with the A.G.V. system, the *only* use of the Hollywood Rail is to hang these items, the installation of which clearly falls within the jurisdiction of the UA. As the Hollywood Rail supports UA installed items, the installation of the Hollywood Rail is also the work of the UA. Counsel cites as analogous the situation where a bracket or support is installed by that trade whose work is primarily supported by the bracket or support.

43. The UA claims the support steel from which the Hollywood Rail is suspended on much the same basis. In the A.G.V. system, the support steel supports the Hollywood Rail which is, or ought to be, installed by the UA. In addition, the support steel is itself also used to support the F.L.R. systems and UA piping and therefore falls within the jurisdiction of the UA. Finally, it is asserted that the support steel does not support the work of the Millwrights or Ironworkers because, in the A.G.V. system, the support steel no longer supports a conventional conveyor system.

44. The UA position is that in the past the support steel fell within the jurisdiction of the Ironworkers and Millwrights because it supported a conveyor, something which also fell within the jurisdiction of the Ironworkers and Millwrights. With the introduction of the A.G.V. system, because the support steel no longer supports a conveyor and supports only pipes and F.L.R. systems (which it is asserted fall within the UA jurisdiction) that support steel must also fall within the UA jurisdiction. Indeed, counsel asserted that that it was a misnomer to refer to this as support steel and suggested that it was more appropriate to call the angle iron, channel iron, etc. "pipe supports" or "pipe hangers".

45. The UA asserts that the new technology of the A.G.V. system has changed the installation, purpose, quantity and weight of the support steel which hangs from the building steel above the A.G.V. system to such an extent that, whereas in the past the support steel was necessarily assigned to the Ironworkers and Millwrights, that past practice no longer holds true.

46. The UA submits that where the support steel is used to support an overhead conveyor, the support steel has necessarily been of heavier weight and greater quantity, making it relatively easy for the UA to hang its pipes merely by affixing pipe brackets or pipe hangers to the existing support steel and/or building steel. The multi-use purpose of the support steel in that instance meant that it fell within the jurisdiction of the Millwrights and/or Ironworkers.

47. Without an overhead conveyor, the amount of support steel required is decreased. In addition, because the steel does not have to support a heavy overhead conveyor, the actual steel used is "lighter". The UA therefore, asserts that the decrease in strength and quantity of the support steel has meant that the UA can no longer merely attach its pipes by attaching brackets or other pipe hangers to existing support steel. Rather, it must install its own angle iron (which it calls pipe supports) and attach brackets to that angle iron in order to hang the pipes and F.L.R. systems which fall within its jurisdiction.

48. After a review of the totality of the evidence, we find that, although the A.G.V. system is indeed "new technology", this new technology has not changed or altered the installation and purpose of the support steel and tool rail to such an extent that the evidence of area or past practice should be restricted to only A.G.V. system installations. What is "new" in the A.G.V. system is the Automated Guided Vehicle itself, or the manner in which the automobile is transported or conveyed from one part of the plant to another during the assembly process. That "new technology" has not, however, significantly altered or changed the nature of the work in dispute, namely the installation of support steel and Hollywood Rail. That work remains essentially the same, and continues to be performed in the same manner, requiring the exercise of the same type of skills.

49. The position of the UA that the new A.G.V. system has significantly changed the nature of the work in dispute was not supported by the evidence. There was no evidence to suggest that either the installation or purpose of the Hollywood Rail was different depending on whether that Hollywood Rail was used in the A.G.V. system or in the traditional conveyor system. Regardless of whether the Hollywood Rail forms part of a conventional conveyor system or is part of the work cells in the A.G.V. system, the method of installation remains the same. At best, the only difference is that the length of the Hollywood Rail used in the A.G.V. system may be shorter than the length of Hollywood Rail used with the traditional conveyor system. In either instance, however, the nature of the work and purpose of the Hollywood Rail is the same. It is installed so that both pneumatic and non-pneumatic tools, F.L.R. systems and trays carrying small parts can be hung from the trolleys attached to the Hollywood Rail to facilitate the movement of these items by the G.M. employee.

50. Similarly, we find that the nature of the work in respect of the support steel in the

A.G.V. system has remained basically unchanged from the support steel used in those areas of the G.M. plant where traditional conveyor systems are in operation.

51. Although it is true that the quantity and strength of the support steel is less in the A.G.V. system where the support steel does not also support a conventional overhead conveyor, the same can be said in those many areas of the G.M. plant where there is a traditional floor conveyor without an accompanying overhead conveyor. The UA's position that the support steel is significantly different with the A.G.V. system is inconsistent with the substantial and uncontradicted *viva voce* evidence of all of the witnesses (including those called by the UA) that the support steel above the A.G.V. system is essentially the same as the support steel above a floor conveyor. Many of the witnesses testified that in many areas of the G.M. plant in Oshawa, only a traditional floor mounted conveyor is used without the presence of an accompanying overhead conveyor. In those instances, the evidence discloses that there is no difference between the quantity, strength or purpose of the support steel which hangs above that traditional floor mounted conveyor, and the quantity, strength or purpose of the support steel which hangs above the A.G.V. system.
52. Finally, we note that in his evidence, Mr. Burrows, the UA Business Agent consistently adopted the position that, regardless of whether the Hollywood Rail was used in conjunction with a traditional floor conveyor, a traditional overhead conveyor or the new A.G.V. system, the UA would claim the Hollywood Rail if it carried or supported pneumatic tools. Mr. Burrows testified that it did not matter what type of conveyor was being used in the production process, the important aspect of the UA's claim was that the end use of the Hollywood Rail was to support pneumatic tools. We will address the "end use" position of the UA in greater detail herein. We note however that Mr. Burrows' position to Newmarch, and his evidence before us, that the UA was entitled to the work in dispute because of the "end use" of the work, diminishes and detracts from the UA position that the emergence of the "new technology" of the A.G.V. system lies at the root of the UA's claim.
53. For all of these reasons, we have determined that the evidence of area or industry practice should not be limited to only those few instances involving the installation of support steel and Hollywood Rail in the A.G.V. system.
54. We have therefore considered all of the evidence relating to the installation of support steel and Hollywood Rail which was placed before us. The vast majority of that evidence indicates that, with few exceptions, support steel and Hollywood Rail is traditionally installed by a composite crew of Millwrights and Ironworkers. Moreover, the assignment of that work to a composite crew of Ironworkers and Millwrights in the past has not been challenged by the UA. There are some minor exceptions or instances where it appears that the UA did in fact install Hollywood Rail, but a much greater majority of the evidence indicates that installation of Hollywood Rail by the UA is the exception and not the rule.
55. There are two notable exceptions to the evidence of area or industry practice indicating that, *generally* Hollywood Rail and support steel is installed by a composite crew of Ironworkers and Millwrights which we wish to address. The first is Newmarch's assignment in December 1986, to which reference has already been made. The other is evidence of a mark-up meeting conducted by Nicholls Radtke in September 1986.
56. In the summer of 1986, Nicholls Radtke was awarded a contract involving the installation of support steel and KBK Rail. KBK is another type of tool rail. The function, purpose and installation of the KBK rail is similar to the Hollywood Rail. The work was assigned by Nicholls Radtke's representatives in the field without a formal mark-up. It is not unusual in the automotive industry to assign work without a mark-up because, as stated by Mr. Nicholls, the rules "are pretty

well laid out". The work was assigned to a composite crew of Ironworkers and Millwrights. As the work was proceeding, the UA representatives contacted Nicholls Radtke and requested a mark-up as the UA was of the view that its work had been improperly assigned to the Ironworkers and Millwrights. A mark-up meeting was held, the results of which were summarized in a letter by Mr. Nicholls which states as follows:

The evidence received from the Ironworker relates, among other things, to awards by conveyor companies, regarding 50/50 awards to MW/IW for installation of steel structure supporting conveyors and other trades work. We agree with this assignment; however, in this application there is no conveyor involved. This is a new system in the automotive industry in Canada and we, therefore, find it very difficult to find any area practice on which we can base an assignment. The steel structure in this contract supports pipe (air and oil), conduit and lights and KBK rail. The KBK rail in turn supports synflex hose and pneumatic tools or hoists. The hose, tools and hoists are not in this contract and will be installed by G.M..

After much deliberation, it is our opinion that:

- 1) The Ironworker has a claim to the work by virtue that the overall work forms a structure.
- 2) The Pipefitter has a claim to the work by virtue that almost everything supported by this structure falls within his jurisdiction.
- 3) As there are no conveyors involved, it is difficult to see the involvement of the Millwright.

As we are all aware, the work in question has been proceeding and is approximately 80% complete. In order not to cause any undue hardship on the customer, the trades or the contractor, it is our intent to complete the work with the trades who started the work. However, if another project should arise at G.M., Oshawa using this system, our award for the support steel in question would be a 50/50 assignment of IW/UA.

Neither the Millwrights nor the Ironworkers took any steps which indicated disagreement with this letter.

57. Counsel for the UA argued this assignment supported the position of the UA before us and was particularly important because it recognized that the work in dispute involved new technology so that "area practice" was "difficult to find", and was the first mark-up involving support steel used with the A.G.V. system. Mr. Bannerman testified that in making its assignments both in December 1986 and July 1988, Newmarch placed great weight on this documentary evidence filed by the UA in support of its claim. Newmarch did not contact Nicholls Radtke to determine if in fact Nicholls Radtke made subsequent assignments in accordance with this letter.

58. We find that, in the circumstances of this case, the weight to be given to this evidence is insufficient to rebut or counteract the substantial evidence of the witnesses, (including Mr. Nicholls) that *prior* to the writing of this letter, support steel and Hollywood Rail was generally assigned to a composite crew of Millwrights and Ironworkers. We have already expressed our view that the fact that the A.G.V. system was "new technology" does not significantly impact upon the work in dispute. Further, we concur with the submissions of counsel for the Ironworkers and Millwrights that an adverse inference should not be drawn from their failure to object to this "paper assignment". It would be inappropriate for the Millwrights or Ironworkers to grieve or file a jurisdictional dispute as a result of this letter in circumstances where they had been assigned and were actually performing the work. Moreover, we are of the view that, in determining area or industry practice, the Board must concern itself with how the work has *actually* been assigned and performed, not with how employers *would* assign work. In this case, not only was the 1986 work actu-

ally assigned and performed by a composite crew of Millwrights and Ironworkers, in 1988 when Nicholls Radtke received a contract involving substantially similar work, the work was *not* assigned in accordance with this 1986 "mark-up" but was once again assigned to a composite crew of Millwrights and Ironworkers.

59. On June 22, 1988, Nicholls Radtke assigned work in the body shop at G.M. That work included installation of *inter alia* floor conveyors, piping services and overhead steel. In its assignment, Nicholls Radtke stated that, "the 50/50 Ironworker/Millwright automotive agreement will be in effect for this project." Notwithstanding the fact that the work did not involve an overhead conveyor, Nicholls Radtke assigned the "overhead steel and rails" including the Hollywood Rail to a composite crew of Ironworkers and Millwrights.

60. Mr. Nicholls testified that this assignment of the Hollywood Rail was distinguishable because "[I] assume it is Hollywood Rail without air ... perhaps it's because it supported balancers, that makes it different from the rationale in the 1986 letter". In its assignment to the trades, Nicholls Radtke states "the Hollywood Rail assignment remains the same because the major purpose of the rail is to support balancers only."

61. We note that in the present case the Hollywood Rail *also* does not transport air to power the tools. In respect of the fact that the Hollywood Rail has suspended from it "balancers", we note that balancers are a spring-loaded device used with heavier tools to counteract the weight of the tool thereby making it easier for the production employee using the tool. Balancers are used for both heavier pneumatic and non-pneumatic or electrical tools. In the case of the 1988 assignment, Mr. Nicholls did not know which type of tool would be hung from the balancers although it is clear that then, as is the case before us, the Hollywood Rail was used to support tools.

62. In view of these facts, notwithstanding the 1986 Newmarch assignment or the 1986 Nicholls Radtke "paper assignment", we find that the area or industry practice favours an assignment of the work to a composite crew of Ironworkers and Millwrights.

End Use

63. In the past, the Board has not looked at the use made of the end product in determining jurisdictional dispute claims. Rather, the focus of the Board has been on the nature of the work in dispute, and the work performed by the employees in each trade. Thus, in *Toronto Star Newspapers Ltd.*, [1980] OLRB Rep. April 565, after referring to the decisions of the Quebec Labour Court sitting in appeal from a decision of a labour commissioner in *La Presse Limitée*, and the Labour Relations Board of British Columbia in *Re. Pacific Press*, the Board stated at paragraph 19:

19. We accept the conclusion reached in both *Pacific Press*, *supra* and *La Presse*, *supra*, that the Board must look to the nature of the work done by the employees and not the use made by the employer of the end product of the work in dispute. If the end product was to be cast as a primary criterion the result would be to downgrade the importance of skills and ability, and efficiency, as primary criteria. Clearly the skills associated with performing a work process and the efficiency with which it is performed are inter-related factors. A craft union is one whose members "are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or craft." When called upon to resolve competing work claims between craft unions the Board must look to the work and determine if the skills of one of the crafts are more closely related to the nature of the work in dispute and whether or not the use of these skills by persons trained in the craft will have a bearing on efficiency and economy. If we were to restrict ourselves to the end product these considerations, which must be central to the resolution of any jurisdictional dispute, would become irrelevant.

(See also *Premier Pipe Line*, [1988] OLRB Rep. Oct. 1068 at paragraph 26). We agree with and adopt these earlier observations of the Board. “End use” is not an appropriate criteria to assist in the determination of this jurisdictional dispute. Moreover, in this case, the evidence does not support the claim of the UA to either the Hollywood Rail or the support steel on the basis of “end use”. Indeed, the evidence is to the contrary and highlights the difficulty in applying the “end use” criteria in jurisdictional dispute complaints.

64. In respect of the claim by the UA to the Hollywood Rail because its “end use” is to support air tools and F.L.R. systems, we note first that the parties have agreed that *both* pneumatic and non-pneumatic tools are suspended from the Hollywood Rail. We further note that the rigid piping which transports the air which powers the pneumatic tools to the various work cells is not itself affixed to the Hollywood Rail. That rigid piping may be attached by brackets, supports, etc. to either the building steel or to support steel. The evidence further discloses that throughout the plant, Hollywood Rail may have suspended from it both pneumatic tools and non-pneumatic tools, F.L.R. systems, trays carrying small parts, etc. Not all of these items fall within the jurisdiction of the UA. In these circumstances, we do not accept that the “end use” of the Hollywood Rail is *solely* to support items which fall within the jurisdiction of the UA.

65. Of equal importance in our rejection of the “end use” criteria, is the overwhelming and uncontradicted evidence which indicates that Newmarch and the other contractors who have over the years installed Hollywood Rail at G.M. do not themselves always install either the tools or the F.L.R. systems which are attached to the Hollywood Rail. Those items are typically installed by G.M. with its own forces. Indeed, the evidence discloses that the contractors who install the Hollywood Rail generally do not know what the end use of the Hollywood Rail will be. Although it is generally assumed that the Hollywood Rail will hang tools, the contractor does not know if that is in fact the case, does not know if *only* tools will be hung from the rail, and does not know if those tools will be pneumatic or non-pneumatic tools. What is hung from the Hollywood Rail is left up to G.M. and any items hung from the Hollywood Rail are typically installed by G.M. according to its own specifications. Once installed, the items may be changed, removed or relocated at any time without disturbing the installation of the Hollywood Rail itself. Thus, Hollywood Rail whose “end use” at the time of installation was solely to support non-pneumatic tools may at some future date have as its “end use” the support of pneumatic tools or vice-versa.

66. In view of the fact that the ultimate “end use” of the Hollywood Rail is not known to the contractor, and in any event may be changed at any time by G.M., and in light of the fact that the contractor who installs the Hollywood Rail does not install the “end use” items, we find it inappropriate to consider the “end use” of the Hollywood Rail as a factor in determining this jurisdictional dispute complaint. To consider “end use” in these circumstances is not only inconsistent with the previous practice of the Board in dealing with section 91 complaints, but would lead to uncertainty in the industry. Contractors in the industry would have to determine in advance what the work in dispute was to be used for in order to bid upon a project and thereafter assign the work. Similarly, a trade union would have to ascertain the “end use” of the work in order to determine whether it had a claim to the work. Its claim to the installation of the Hollywood Rail would vary from project to project depending on the end use of the Hollywood Rail. End use therefore would not only “down grade the importance of skill and ability and efficiency” as criteria, but would in all likelihood increase jurisdictional disputes and claims amongst unions. The work assignments and work jurisdictions claimed by trade unions would be in a constant state of flux as the work was assigned to different trades, depending on the “end use” of the Hollywood Rail which was installed.

67. The same is true if we were to apply the “end use” factor to a trade union’s claim to the

support steel. In this case, for example, if the Board finds that the UA does not have a claim to the Hollywood Rail, its claim in respect of the support steel is weakened because, as we understand it, the UA claims the support steel by reason of the fact that the support steel supports the Hollywood Rail which it claims it is entitled to install. On the other hand, if we were to conclude that the UA does have a claim to the Hollywood Rail, its corresponding claim to the support steel is strengthened.

68. In any event, the evidence discloses that the support steel in this assignment was not single-purpose support steel. Rather, it was multi-use support steel which supported *inter alia*, the tool rail, lights, fans, conduit, air pipes, lubricating piping, F.L.R. systems, etc. Of these items only the piping was installed by the UA and clearly falls within its jurisdiction. The F.L.R. systems were ultimately installed by G.M. employees and not by any of the trades in dispute. In light of this evidence, even if we were to accept the UA's position regarding "end use" as an appropriate criterion, the "end use" of the support steel in this instance was not *solely* to support work which fell within the UA's trade jurisdiction.

69. Having regard to the foregoing, the Board has concluded that the work in dispute was improperly assigned. Pursuant to the provisions of section 91 of the *Labour Relations Act*, the Board makes the following directions:

Newmarch Inc. shall assign work associated with the unloading, handling and installation of tool rail, and specifically Hollywood Rail and Loudon Rail, and support steel in Board Area 9 to employees who are represented by the International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 and employees represented by the Millwrights District Council of Ontario.

2018-88-U; 2019-88-U; 3122-88-U United Steelworkers of America, Applicant v. Plaza Fiberglas Manufacturing Limited and Plaza Electro-Plating Ltd., Citcor Manufacturing Ltd., and Sabina Citron, Respondents; United Steelworkers of America, Complainant v. Plaza Fiberglas Manufacturing Limited and Plaza Electro-Plating Ltd., Citcor Manufacturing Ltd., and Sabina Citron, Respondents; United Steelworkers of America, Complainant v. Plaza Fiberglas Manufacturing Limited and Plaza Electro-Plating Ltd. and Sabina Citron, Respondents

Damages - Duty to Bargain in Good Faith - Final Offer Vote - Interference in Trade Unions - Lockout - Remedies - Unfair Labour Practice - Employer engaging in illegal lockout by transferring bargaining unit work to another company immediately before strike/lockout deadline - Work transfer motivated at least in part by desire to avoid union - Employer breaching duty to bargain in good faith by sending uninformed representatives to bargaining table, by failing to disclose contemplated transfer of work, and by bargaining directly with employees hired to work at other company - Direct bargaining constituting interference in trade union - Employer demand for employee consent to release of address for final offer vote constituting interference in trade union - Board ordering employer to cease and desist from violations of Act - Board ordering resumption of bargaining meetings - Board ordering employer to compensate all bargaining unit employees for monetary losses arising out of breaches - Board ordering employer to pay union's negotiating costs -

Board ordering employer to return work to original company and to make no further movement without disclosure to union - Board ordering employer to provide union with names and addresses of bargaining unit employees as of lockout date and to advise of additions or changes - Board ordering workplace Notice of Posting signed personally by employer - Board ordering copy of decision to be mailed to all bargaining unit employees

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *M. Rozenberg* and *K. Davies*.

APPEARANCES: *L. A. Richmond*, *C. M. Mitchell*, *M. Crnkovich* and *J. Perquin* for the applicant/complainant; *Michael Gordon*, *Paul Wearing*, *Thomas F. Stefanik* and *Mary Eberts* for the respondents.

DECISION OF PATRICIA HUGHES, VICE-CHAIR; February 23, 1990.

1. For reasons set out below, my decision includes my findings, conclusions and the remedies I direct with respect to Board File Nos. 2018-88-U, an application under section 93 of the *Labour Relations Act* ("the Act"), and 2019-88-U and 3122-88-U, both complaints under section 89 of the Act. As they indicate in their decision, Board Members Rozenberg and Davies concur in those findings, conclusions and remedies with respect to the section 89 complaints; their separate decision stems only from the fact that my decision combines the section 93 application which was before only me, as well as both the section 89 complaints which were before the tri-partite panel.

I. Procedural Background and "Preliminary" Rulings

2. In July 1988, the United Steelworkers of America ("the Steelworkers" or "the union") and Plaza Fiberglas Manufacturing Ltd. ("Plaza Fiberglas") and Plaza Electro-Plating Ltd. ("Plaza Electro-Plating") (together "the company" or "the employer") began negotiations for the renewal of their first collective agreement. On November 14, 1988, the company advised the employees working at Plaza Fiberglas that there was no work to be done at that location (the employees working at Plaza Electro-Plating have never ceased work). Throughout these proceedings, the parties characterized the events of November 14th as a "lock-out". The union claims that that lock-out, which no one disputes was timely, is illegal because it was motivated by a desire to avoid the union and the ramifications of certification. It therefore filed an application under section 93 of the Act on November 24, 1988, naming as respondents Plaza Fiberglas, Plaza Electro-Plating, Citron Automotive Industries ("Citron Automotive") and Sabina Citron (Board File No. 2018-88-U). On the same day, it filed a complaint alleging that the same respondents had breached sections 15, 64, 66, 70 and 75 of the Act ("the first section 89 complaint") (Board File No. 2019-88-U). On March 20, 1989, after the panel had begun hearing that section 89 complaint, the union filed another section 89 complaint arising out of the ordering by the Minister of Labour of a final offer vote as requested by the employer ("the second 89 complaint"), alleging that Plaza Fiberglas and Plaza Electro-Plating and Sabina Citron had contravened sections 15, 40(1), 64, 66 and 70 of the Act (Board File No. 3122-88-U); on agreement of the parties, that complaint was heard by this panel together with the first section 89 complaint (see decision dated May 3, 1989).

3. The union had requested that the first section 89 complaint and the section 93 application be consolidated; the respondents disagreed. A somewhat differently constituted panel orally refused consolidation, finding that urgency required that the section 93 application, which could be heard by a vice-chair sitting alone, be heard immediately (see Board File No. 2018-88-U, decision dated December 9, 1988). When it became clear that the urgency required by the section 93 application would not be matched by a corresponding urgency in the conduct of the case, counsel for all parties considered whether the section 93 application and the section 89 complaint should be heard

together after all. The union took the position that they should be heard together, the respondents that they should not be so heard. This panel ruled that they be heard together. The parties agreed, however, that in the event of the panel's so ruling, the chair of the panel should hear the remainder of the evidence relating to the Citron Automotive documents (which had been the only evidence adduced on the section 93 application to that point) and should determine the section 93 decision alone and the tri-partite panel should decide only the first section 89 complaint (the second section 89 complaint had not been filed at that time). That is the approach that has been taken by the panel: the two section 89 complaints have been determined by the tri-partite panel and the section 93 application has been decided by the chair of the panel alone.

4. As indicated, I began to hear the section 93 application, sitting alone. In that capacity, I ruled on some preliminary objections made by counsel for the respondents and heard Mrs. Citron give evidence with respect to documents which the parties had agreed should be produced in relation to Citron Automotive. At the conclusion of that evidence, the tri-partite panel began to hear the section 89 complaint in File No. 2019-88-U. The same evidence was led at the same time in the section 93 application. In presenting its case, none of the parties differentiated between the first section 89 complaint and the section 93 application with respect to the evidence adduced. (The allegations in both are identical.) In fact, all the documentary evidence adduced through Mrs. Citron's testimony before me alone was eventually put before the other two members of the panel, as well. Furthermore, having had the advantage of hearing all the testimony, I am able to say that there was no *viva voce* evidence adduced before me that was not effectively adduced again before the other members of the panel. Since Mrs. Citron testified again, we have all had the opportunity to hear all the witnesses and assess their credibility. Nor did the union seek any remedy in the section 93 application which it did not seek in the section 89 complaint. I observe in that regard that there is no remedy in the section 93 application which could not be given within the framework of the section 89 complaint. For these reasons, I am writing my conclusions with respect to the section 89 complaints and the section 93 application as one decision. Board Members Rozenberg and Davies' concurring decision in File Nos. 2019-88-U and 3122-88-U follows.

5. The union requested that Citcor Manufacturing Ltd. ("Citcor") be added as a respondent in the first section 89 complaint and in the section 93 application. "Citcor Manufacturing Ltd." is the amended name of "692299 Ontario Limited" which had been incorporated on November 28, 1986; its articles of incorporation were amended on November 17, 1988 (three days after the lock-out) to reflect the change in name. Sabina Citron, the President of Plaza Fiberglas and Plaza Electro-Plating and of Citcor, explained that Citron Automotive, which was located at 14 Citron Court, Concord, is no longer in business and that it was amalgamated with Plaza Fiberglas on May 1, 1985. Citcor operates from 14 Citron Court. Although it was mistaken in the proper name of the entity, the union intended to name the entity operating out of 14 Citron Court. Unbeknownst to the union when it filed its complaint, that entity was Citcor, not Citron Automotive which had previously been located there. Furthermore, the employer has been aware of the proper name of the entity to which the work had been moved from the outset of these proceedings. Accordingly, "Citcor Manufacturing Ltd." is added to and "Citron Automotive Industries" is deleted from the style of cause as respondent. (In discussing the lock-out, I use "Citcor" to apply to the entity operating at 14 Citron Court, even though that was not its name until November 17th.)

6. Counsel for the respondents submitted that should Citcor be added as a respondent, Plaza Electro-Plating should be deleted as a respondent since there has been no allegation nor any evidence that Plaza Electro-Plating has contravened the Act. Plaza Electro-Plating was found to be a common employer with Plaza Fiberglas within the meaning of subsection 1(4) of the Act by the Board when it certified the Steelworkers to represent employees of those entities (see decision

dated February 7, 1986 in Board File Nos. 1465-85-R, 1466-85-R and 1467-85-U, "the certification decision"). Thus Plaza Electro-Plating and Plaza Fiberglas are treated "as constituting one employer for the purposes of [the] Act". Plaza Electro-Plating is therefore properly named as part of the company for which the union is certified.

II. The Historical Background

7. It is useful to place the union's allegations within the perspective of the historical relations between the union and the employer. As the Board's decisions and other proceedings show, those relations have been troubled since their inception.

8. Plaza Fiberglas and Plaza Electro-Plating were founded by Adam Citron, husband of the current President, Sabina Citron, in the 1950s, eventually moving to their present locations at 4420 and 4460 Chesswood Drive (Plaza Fiberglas) and 4440 Chesswood Drive (Plaza Electro-Plating). (Plaza Fiberglas also has a location at 50 Vanley Crescent.) Mrs. Citron had been involved with the companies to varying degrees since their beginnings, but became more so in early 1985 after her husband became ill; from September 1985, she was very active on a part-time basis (that is to say, she was required to share her concerns between the company and her husband) and then, after her husband's death on November 14, 1985, she devoted herself to running the company. It is clear from her own testimony, as well as that of others, that Mrs. Citron reserves to herself not only the right to make all final decisions necessary to the company's functioning, but that she makes all the effective decisions integral to the day-to-day running of the company. She has the same relationship with Citcor.

9. In September 1985, the Steelworkers filed an application for certification as bargaining agent of all employees (with the usual exceptions) of Plaza Fiberglas, Plaza Electro-Plating and Citron Automotive in Metropolitan Toronto, accompanied by a complaint under section 89 of the Act, upon which the union based its request that it be certified pursuant to section 8 of the Act. Since Citron Automotive had no employees at the addresses named in the application, the application was not pursued against Citron Automotive. (See *Plaza Fiberglas Manufacturing Limited*, [1985] OLRB Rep. Oct. 1503.)

10. In the course of the certification proceedings, the Board, on the request of the union, stated a case to the Divisional Court under section 13 of the *Statutory Powers Procedures Act* ("the SPPA") in relation to the employer's failure to post the notices to employees of the certification application as required by the Act. (See *Plaza Fiberglas Manufacturing Limited*, [1985] OLRB Rep. Nov. 1648.) In the result, Plaza Fiberglas and Plaza Electro-Plating were found in contempt and required to pay a fine.

11. The Steelworkers were certified to represent employees at Plaza Fiberglas and Plaza Electro-Plating (treated as a single employer) after they and the company agreed to settle all outstanding issues between them; as part of the settlement, the company agreed that its conduct had been such that the union should be certified pursuant to section 8 of the Act and that was reflected in the Board's certification decision. The parties entered into their first collective agreement effective October 20, 1986. Although Mrs. Citron had requested an early start to negotiations renewing the agreement, in April 1988, the usual difficulties in scheduling meetings meant that actual negotiations into the renewal of the collective agreement began in July 1988. After several meetings, the union sought conciliation and finally a "no-board" report, which was granted on October 28, 1988. The parties were then in a legal strike/lock-out position as of 12:01 a.m. on November 14, 1988.

12. At that time, Plaza Fiberglas, with about 200 employees in the bargaining unit, manufactured fibre glass parts for trucks, including deflectors, sunshades, shrouds, a few other small

parts and most significantly, hoods, for two major customers, Navistar and Volvo GM, and to a negligible extent, for Volvo Sweden. The Navistar work constituted about 60%-65% of the work performed by Plaza Fiberglas, with Volvo GM the vast proportion of the rest. Most of the work done at Plaza Fiberglas resulted in "production" hoods, that is, hoods which become part of new trucks. The production schedule of Plaza Fiberglas was thus driven by the assembly line demands of Navistar and Volvo GM. In addition, Plaza Fiberglas did service work for its customers; for example, service hoods are needed to replace hoods on damaged trucks. The demand for service hoods constituted about one per cent of the work done at Plaza Fiberglas. Plaza Electro-Plating repairs damaged bumpers, including replating or chroming of bumpers, and has 25 to 30 bargaining unit employees. Citron Automotive had been used for after market fenders (that is, metal, not fibre glass, parts) during 1982 and 1983, but subsequently became "dormant" when Mr. Citron became ill.

13. On the week-end before the November 14th deadline, the molds used to make production and service hoods for both Navistar and Volvo GM were transferred to what became Citcor at 14 Citron Court in Concord, and therefore outside the scope of the bargaining unit. As a result, approximately 200 employees were locked-out. Toward the end of November, Navistar insisted that its work be returned to Plaza Fiberglas and their molds were returned; the company established a "return to work protocol" for recalling employees from the lock-out to which the union objected on the basis that it did not conform to the seniority clause of the collective agreement (the meaning of that clause and the wording of the seniority clause in the new agreement were contentious matters in bargaining). In any case, by mid-March about 110 employees had returned to work at Plaza Fiberglas, but since Navistar eventually withdrew all its business and there is currently no work being performed at Plaza Fiberglas, except production of about five hoods a week for Volvo Sweden, most of them were laid off. By the end of these proceedings, upwards of fifty employees were employed at Citcor making production and service hoods for Volvo GM.

III. The Issues

14. The union's complaints involve allegations of bargaining in bad faith and of various unfair labour practices. Subsection 89(5) of the Act provides that a reverse onus applies in cases in which it is alleged that "a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to [the] Act as to his employment, opportunity for employment or conditions of employment". In this case, therefore, as in many similar kinds of section 89 complaints before the Board, there is a mixed onus: with respect to the section 15 allegations, the union has the onus; with respect to the unfair labour practice allegations, the employer has the onus by virtue of subsection 89(5) of the Act. In *Amoco Fabrics Ltd.*, [1982] OLRB Rep. Mar. 314, the Board dealt with similar allegations of bad faith bargaining and unfair labour practices arising out of a transfer of work; in that context, the Board said, at paragraph 29, that "[t]he burden is upon the complainant union to establish that the company has failed to bargain in good faith and make every reasonable attempt to make a collective agreement; the burden is upon the company to establish that . . . the transfer of work . . . was not the result of an anti-union motive or an intention to chill lawful union activity" (at para. 8); more specifically, "[t]he company bears the burden of coming forward with a full and satisfactory explanation establishing the reasons for [in the context of that case] the layoff of the employees. . . ." (at para. 29). Under section 93, of course, the union has the onus of satisfying me that the respondents have engaged in an illegal lock-out. In the event, however, the issue of onus did not arise in the determination of these matters.

15. Furthermore, the Board must be satisfied that the employer's conduct is not motivated at all by a desire to interfere with the union's representation of the employees, or with the employ-

ees' exercise of rights, even if it was in part motivated by "legitimate business reasons": *Sunnycrest Nursing Homes Limited*, [1981] OLRB Rep. Feb. 261 and the cases cited therein.

16. Once a party to a collective agreement has given notice of desire to bargain a renewal of a collective agreement or a new agreement, section 15 of the Act requires the trade union and the employer to "bargain in good faith and make every reasonable effort to make a collective agreement". In *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. Mar. 49, the Board articulated at paragraphs 14 and 15 two important aspects of bargaining underpinning the duty imposed on the parties by section 15: one is "that of reinforcing an employer's obligation to recognize a trade union lawfully selected by employees as their bargaining agent"; the second purpose is "to foster rational, informed discussion thereby minimizing the potential for 'unnecessary' industrial conflict".

17. Section 64 of the Act prohibits the employer from interfering with the union's representation of employees, or, in essence, from undermining the union's status as the employees' exclusive bargaining agent. It acknowledges that once the union has been certified to represent the employees, the employer's direct contact with employees (and vice versa) is circumscribed. Nor may an employer penalize or treat differently an employee because he or she is a union member or for exercising rights under the Act, conduct proscribed by section 66 of the Act. Section 70 prohibits a person from using intimidation or coercion to stop another person from exercising rights under the Act. These provisions are all designed to ensure that the certification is meaningful, both from the union's perspective and from that of the employees who expressed the desire to act collectively. Similarly, employees who oppose the union are not to be discriminated against on that ground.

18. I turn now to the specific allegations. The first group of issues together comprise an allegation of failure to bargain in good faith, coupled in part with allegations of contraventions of sections 64, 66 and 70 of the Act. (In light of my findings with respect to these allegations, I have not found it necessary to deal with an allegation by the union that the employer failed to provide necessary information relating to the employees' unemployment insurance claims.) The union has also brought an allegation that the company has engaged in an illegal lock-out, both under section 89 of the Act, citing a contravention of section 75, and under section 93 of the Act.

A. Surface Bargaining

19. The duty section 15 imposes relates primarily to process. Therefore, the union and the employer may well negotiate in good faith and may well try to reach an agreement and yet fail to do so: such a failure would not constitute a violation of section 15. There is no duty to reach an agreement in fact, merely to make every appropriate attempt to do so. Thus "both parties are entitled to bargain hard for the agreement that they believe to be acceptable. This is so even if one of the parties has as [sic] overwhelming strength at the bargaining table and is able to achieve most or all of its needs": *Radio Shack*, [1979] OLRB Rep. Dec. 1220, at paragraph 66. For that reason, the Board makes a distinction between "surface bargaining" and "hard bargaining". The first is, in effect, "sham" bargaining, bargaining in such a way as to demonstrate an intention not to enter into an agreement; the latter refers, on the other hand, to the tabling of and insisting on "tough" positions which the other party may be extremely reluctant to accept. Either party may, with a few exceptions (such as an attempt to alter the scope of the bargaining unit), resort to economic sanction to achieve the collective agreement it wants, if it has the strength to do so or is prepared to accept the cost. On their face, few proposals clearly cross the line from hard bargaining to surface bargaining. Accordingly, the Board "will be circumspect in finding surface bargaining based *solely* on the positions taken at the bargaining table": *Aristokraft Vinyl Inc.*, [1985] OLRB Rep. June 799, at paragraph 34 (emphasis in original).

20. A great number of proposals were the subject of negotiation, some still outstanding by the time these proceedings commenced. The union had the greatest difficulty with three of the company's proposals in particular, however: those on wages, the rules and seniority. The union had also proposed a new provision in the agreement, article 13.12(b), requiring the company to supply the union with the name, address and telephone number of each employee twice a year. The company refused to agree to this provision and, in fact, took strong exception to revealing employees' addresses without their consent.

21. In brief, the union's wage proposal coincided approximately with the rates offered to certain employees at Plaza Fiberglas in contravention of the collective agreement: the union argues that the fact those higher rates were offered by the company shows what the market-rate was. The company should, the argument goes, offer the market-rate and a failure to do so, when offered to individual employees means the wage proposal is intended for rejection. The parties also disagreed on how jobs were to be reclassified.

22. "The rules" refers to rules covering conduct in the workplace which the parties had agreed to during their 1986 negotiations, but which had not been included in the collective agreement. They had been posted in the workplace, however. Mrs. Citron instructed the management committee that they were to be included in the collective agreement; the union objected to such inclusion. This was initially the only debate between the parties on the rules. At that stage, the company's proposals provided that "Committing any of these violations will be sufficient grounds for disciplinary action, up to and including discharge, depending upon the seriousness of the offence and the judgment of management".

23. In its November 29th proposals, tabled after the resumption of talks in conjunction with the return of the Navistar work to Plaza Fiberglas, the company amended the last line of its rules proposal to read: "Committing any of these violations will be sufficient grounds for discharge". The union felt it could not agree to such a change because to do so would limit its power to represent the employees. The only issue it could put to an arbitrator would be whether the employee had in fact committed the breach alleged; the arbitrator would have no power or jurisdiction to change the remedy if a breach were found. There seems no doubt that Mrs. Citron's strong position on this issue stems from a March 1988 arbitration award in which Plaza Fiberglas was directed to reinstate an employee who had been discharged because Mrs. Citron considered that he had behaved in an insolent and insulting manner towards her (*Re Plaza Fiberglas Manufacturing Ltd. and United Steelworkers* (1988) 33 L.A.C.(3d) 193 (Aggarwal)). Mrs. Citron apparently refused to reinstate the grievor because she felt she could not operate the company under such circumstances; eventually the matter was settled with a financial payment without the employee's reinstatement.

24. The union sought to add a new article 13.01(b) to the seniority provisions stating explicitly that "Seniority shall be on a Company wide basis and shall mean total length of continuous service in the bargaining unit as defined in Article 3". The first agreement did not contain such a specific clause, although article 13.05 states that "[w]hen it becomes necessary to reduce the work force due to a lack of work, seniority (being length of continuous service with the company) shall be the guiding factor for such layoffs". The company argued that the existing language meant that seniority was departmental-wide and refused to change the wording. In its October 21st proposal, the company sought to specify that the provision that "job opportunity and security shall increase in proportion to length of service" would refer explicitly to "departmental" service (see old article 13.02(a)). Then in its final offer, the company inserted "departmental" before the word "service" into what would be article 13.06(a) (the old article 13.05). The union says it could not accept wording limiting seniority to departmental seniority because, as it put it, that would be giving up something it already had.

25. While the company proposals referred to above would be difficult for the union to accept, they do not in or by themselves constitute “surface bargaining”, thus justifying a finding of bargaining in bad faith. The disagreement over the meaning of the seniority clause is really one over the meaning of the words in the current provision, a matter more properly before an arbitrator than before the Board. Regardless, that disagreement is not evidence of surface bargaining. As for the allegation that the company changed its proposal on the rules when and in the manner it did, the Board has recognized that “the possibility of a party to bargaining ‘changing its mind’ is necessarily present in any bargaining situation” and is to be expected as the dynamics of bargaining change: *Westroc Industries Limited*, [1981] OLRB Rep. Mar. 381, at paragraph 25. The manner in which the company determined and offered wage rates outside these negotiations gives me difficulty, as I indicate below. But that is different from determining whether the rates offered with respect to the new collective agreement were designed for rejection and thus an example of surface bargaining.

26. While the proposals proffered by the company are not evidence of bad faith bargaining, however, the nature of the employer’s conduct overall during bargaining does lead me to conclude, that the employer has not met its obligation to bargain in good faith. That conduct includes the composition of the company’s bargaining committee, the failure to disclose the movement of work, and the direct bargaining with individual employees.

B. The Obligation to Send an Informed Committee to Negotiations

27. The members of the employer’s negotiating team were Michael Gordon, the employer’s solicitor, sometimes replaced by Thomas Stefanik, a member of the same law firm as Mr. Gordon, Leslie Fiddich, the company’s accountant and Gail Mariano, the company’s personnel manager. Mrs. Citron attended the first meeting between the employer and the union and declined to attend further meetings because she did not care for the attitude of the union’s chief negotiator, John Perquin; she felt that he had insulted her at the first meeting. She also attended or was present in the vicinity of conciliation meetings. Mr. Gordon testified that he advised her not to attend any meetings until the conciliation meetings; he thought there would be a greater chance of getting an agreement if she were not present because an outside negotiator would be able to take a low-key position and treat some of the comments made by the union team as a normal part of bargaining. Mrs. Citron and the management bargaining committee met at the onset of negotiations and discussed the union’s proposals and at that time, she gave instructions with respect to the committee’s ability to respond to each proposal; in that regard, Mrs. Citron explained that each item was dealt with separately and that while the committee members could give their opinion on how the company should respond, once it was decided whether an item was negotiable or non-negotiable (we conclude that that determination was made by Mrs. Citron in the final analysis), the committee could not act in a manner inconsistent with that determination. At least one member of the committee discussed each meeting with Mrs. Citron afterwards and she received copies of minutes prepared by Mr. Gordon.

28. Mrs. Citron explained that the committee could not be given the authority to reach agreement with the union because none of the members was knowledgeable enough about the plant. Mrs. Citron maintains a firm hand on all aspects of the operation of the companies of which she is President. It is clear that the members of the negotiating committee were not informed when they were placed on the committee and did not become informed during negotiations other than to become informed by Mrs. Citron of the positions they were to take. There was even confusion between Mr. Gordon and Mrs. Citron as to whether the committee had to take the whole package back to Mrs. Citron for approval (Mr. Gordon’s understanding) or could take separate items (Mrs. Citron’s view). The respondents have breached the Act by failing to send to the bargaining table a

committee composed of a knowledgeable group of people. The employer's sending an uninformed committee was inimical to the process of "rational, informed discussion" which is crucial to bargaining in good faith.

C. The Obligation to Disclose an Intention to Move Work

29. The reason for requiring disclosure during negotiations of an intention to move work outside the geographic scope of the recognition clause is stated succinctly in *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577, at paragraph 39:

39. . . . the section [15] duty requires an employer to respond honestly when asked in bargaining if he is contemplating initiatives of the type which have a real likelihood of significantly impacting on the bargaining unit. Similarly, can there be any doubt that an employer is under a section [15] obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of the trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the content of the bargain.

30. In *Amoco Fabrics*, *supra*, at paragraphs 40 to 46, the Board concluded that "it would be unrealistic and unresponsive to the sensitive nature of collective bargaining relationships to require employers to bargain with their unions about corporate decisions made in the belief, held in good faith and on reasonable grounds by the employer, that employees will not be adversely affected. In those circumstances the degree of disclosure remains in the discretion of the employer"; furthermore, "[c]onsiderable latitude must be given to management in the exercise of its judgment".

31. In summary, the thrust of the duty to disclose in cases in which the union has asked about changes in the workplace which would likely affect the bargaining unit, is that the employer must respond honestly in order to permit the union to negotiate in relation to such changes and if it considers necessary, modify its own proposals in light of such knowledge.

32. By the spring of 1988, Plaza Fiberglas was having difficulty maintaining the after-market or service portion of its production. Clifford Gout is the sole salesperson for Plaza Fiberglas, and the liaison, or "troubleshooter", between Mrs. Citron and Navistar. In 1987, he had raised with Mrs. Citron the possibility of using a plant he owned in Oakville to make service hoods. Then, sometime around mid-June 1988, he proposed to Mrs. Citron that he open up the Concord plant, then Citron Automotive, which contained machinery, but which was not then in operation. Mrs. Citron eventually agreed. In July 1988, he started to transform the Concord plant, but did not really have the necessary equipment until September and October. Then he began to hire employees; initially, there were seven employees there being paid from \$12.00 or \$14.00 to \$20.00 an hour. The necessary spray and gelcoat booths were built, and then old molds, no longer used in production, were brought over from Plaza Fiberglas. Mr. Gout had involved both Navistar and Volvo GM in these plans and their implementation. Raj Dipchan, previously the acting plant manager at Plaza Fiberglas, and now and since January 1989, the plant manager at Citcor and John Alanko, the production manager from Plaza Fiberglas, among others, assisted Mr. Gout in getting Citcor ready for use.

33. Mr. Gout's goal had been to get the plant into operation before the crash season which lasts from September to March or April, but various delays meant that by November, the plant was still not operational in the way Mr. Gout had hoped. Volvo GM was satisfied, it seemed, but Navistar was not and did not give approval to begin. While he was trying to start up Citcor, Mr.

Gout continued to be involved in sales. He had discussions with both major customers about shortages since both of them were unhappy with the level of production. Plaza Fiberglas agreed to ship them fifty production hoods a day, but then the customers wanted fifty-two, then fifty-four, a level Plaza Fiberglas never reached. In order to make as many production hoods as possible, the service backlog was allowed to increase. Mr. Gout also told the customers, on Mrs. Citron's instruction, that labour negotiations were going on at Plaza Fiberglas and that a settlement would likely be reached.

34. By the middle of November, Mr. Gout was close to getting Navistar's approval. And then "all of a sudden", molds were moved into the Citcor plant on a November Saturday (in fact, this was November 12th, the move having been begun late the previous night, November 11th). There was, said Mr. Gout, "organized chaos". He saw John Alanko, Ram Dipchan and Steve Nirad from Plaza Fiberglas; an additional fifteen or twenty employees were hired quickly. The plant was completely filled up with thirty molds for Volvo GM and fifty for Navistar, the number moved according to Sadrudin Jamal, then production co-ordinator at Plaza Fiberglas, and other fixtures. Mr. Gout described the crew as "green". Within a week, Volvo GM personnel came to Citcor and by the end of the week, Navistar representatives were in attendance; they competed with each other trying to have the hoods they wanted produced because Citcor could not produce enough hoods for both of them. Both Mr. Gout and Mrs. Citron found Volvo GM to be more appreciative of Mrs. Citron's efforts than was Navistar which eventually had their work returned to Plaza Fiberglas. Navistar had also been in the process of sending their work to other manufacturers (at one point requesting that some molds be sent to a manufacturer in the United States) and that intensified until finally Plaza Fiberglas lost Navistar as a customer in June or July 1989. Mr. Gout's connection with Citcor ended after the lock-out at Plaza Fiberglas.

35. Mr. Gout seemed to want to give us the impression that Citcor was for all intents and purposes his operation. There existed no particular business arrangement between Mr. Gout and Mrs. Citron (for example, no partnership agreement or any agreement as to what percentage of profit-sharing might be distributed) in relation to Citcor. He did receive some payment, unspecified, for setting up Citcor. Mr. Gout paid no rent; he paid for none of the equipment. He acknowledged that he could not make Mrs. Citron remove the molds moved there over the November 11th weekend. He expected to be reimbursed for the wages paid the workers he hired, although he says, and Mrs. Citron says, that he decided totally on his own what to pay them. If that were so, it would be an aberration in Mrs. Citron's relationship with her business. If Mr. Gout did decide to pay these rates on his own, he did so believing that he had the implicit or *a priori* approval of Mrs. Citron to do so, a conclusion consistent with Mr. Gout's testimony that Mrs. Citron told him to "get who you need and do what you need to get them". I conclude that Mr. Gout's activities at Citron Automotive were carried out on behalf of and with the approval of Mrs. Citron.

36. Mr. Dipchan was involved in moving the equipment from Plaza Fiberglas to Citcor. He recalled Mrs. Citron's giving instructions about the move "probably a couple of days before" it was done; it took the weekend to get the equipment moved. He went over to Citcor to supervise on the Tuesday after the move, November 15th. At that time, there were employees from Plaza Fiberglas, as well as "some new faces" there. Ramjanali Khoja is the company's health and safety co-ordinator; he also does some personnel work such as initiating new employees. Mr. Khoja was not involved in the move to Citcor, but he thought there were about six Plaza Fiberglas employees at Citcor initially and between twelve and fifteen in June 1989. Mr. Dipchan estimated that about one-third of the forty employees, including supervisors, now at Citcor were former Plaza Fiberglas employees. Mr. Jamal thought there were about nine or ten Plaza Fiberglas employees at Citcor in July 1989.

37. After two weeks or so, Mr. Dipchan returned to Plaza Fiberglas after the molds and tooling for the Navistar work had been transferred back. By the time Mr. Dipchan testified, no more Navistar work was being done at Plaza Fiberglas and very little work for Volvo Sweden (five hoods a week rather than the five a day which had previously been done). When the Navistar work went back to Plaza Fiberglas, Mr. Dipchan was told to recall employees in order of seniority (that is, by departmental seniority); however, he was told by Mrs. Citron, without being given any reasons, not to recall certain employees who had been at Citcor. Towards the end of December, Mr. Khoja became involved in the recall, recalling on the basis of seniority in the classification. He did not recall people who were at Citcor. By the middle of March, about 110 employees had been recalled to Plaza Fiberglas, but the majority were laid off when Navistar withdrew its work and in June, when Mr. Khoja testified, there were about 30 persons employed there, including ten persons on workers' compensation and long-term illness.

38. The company argues that it did not need to disclose the attempts over the summer of 1988 to open up the plant at 14 Citron Court because the plant would be doing only service parts, work which constitutes only about one per cent of the work done at Plaza Fiberglas; it would not, therefore, have a substantial impact on the bargaining unit. In any case, it argues, moving the service work was really a contacting out of the work as permitted by the collective agreement. Furthermore, the move of all the work on the weekend of November 11th was a strike contingency plan and did not need to be disclosed for that reason, in the company's view.

39. There is no doubt that the union specifically asked whether the company intended to move any of its operations. In its July 1988 proposals, in accordance with Steelworker policy, the union sought to amend the recognition clause, article 3.01(b) to extend to the entire province "[i]n the event the Company moves any portion, or the total operation, out of its present location to another in the Province of Ontario". Mr. Gordon told us that he had specifically asked Mrs. Citron whether she had plans to move or close the plant or whether she was thinking of doing so. He said he was confident of the representation that there were no such plans when he made it. Nor did he subsequently become aware of any plans to relocate. At a meeting held on August 31st, the union modified its article 3.01(b) proposal to limit the extended recognition to moves or relocations within an 80 kilometre radius. Mr. Perquin testified that this distance had nothing to do with the Citcor location which falls within that radius relative to Plaza Fiberglas. At the seventh meeting, on September 26th, clause 3.01(b) was listed as an outstanding issue. At the October 18th conciliation meeting, attended by Mr. Stefanik rather than Mr. Gordon, the company maintained its position that no move was intended. After a break in the evening, the union withdrew its proposed clause 3.01(b) based on the company's assurance that it would not move or relocate part of the operation.

40. Mrs. Citron says that she told Mr. Gordon on October 21st that the company could no longer say that it would not move the operations. Mr. Gordon never referred to that conversation in his evidence. I find that if such a conversation occurred, it was couched in language that did not make the point clear (that is, Mrs. Citron may at some point have instructed a change in strategy on bargaining that point, but she did not explain that the reason was because she intended to move some or all of the work); I find it more likely, that it did not occur at all. I find Mrs. Citron's testimony of interest in establishing her perception of the November 11th move, however. She specifically said in the context of the shift of work to Citcor over the summer that she did not think she had to make Mr. Gordon privy to her business decisions and had not done so; it is reasonable to conclude, therefore, that she saw the possibility of moving the production work to Citcor to be of a different kind. I believe that Mr. Gordon had in fact explained her duty to disclose to Mrs. Citron, although she denies he did so, and that she concluded that the movement of production work that she was contemplating in October fell within that duty. I also find that neither Mr. Gordon nor any

other member of the company's negotiating team was aware of the November 11th movement of molds until after it had occurred. Indeed, Mr. Gordon found out for the first time from Mr. Perquin when they met for their planned meeting on November 14th at 10.00 a.m.

41. The employer has the right to contract work out under the collective agreement. In this case, the plan was to move the service work to a company owned by Mrs. Citron, not to contract it out to another manufacturer of auto parts. Indeed, that manner of dealing with Plaza Fiberglas's problems, with the shortfall in production and with the customers' rising dissatisfaction, was one of the alternatives rejected because of the knowledge that once the work went to another supplier, it would be hard to bring it back to Plaza Fiberglas. Other alternatives were tried but did not remedy the problem: these included additional shifts, training additional employees and operating over the Christmas holidays. The employer (as a result of Mrs. Citron's actions) moved the service work to a location owned by her which happened to be unorganized.

42. I conclude that when the employer decided to move work from Plaza Fiberglas to then Citron Automotive and now Citcor, it did not initially contemplate the transfer of all the work, but only of service work, and that production of parts specifically designated as service parts constituted about one per cent of the work performed at Plaza Fiberglas. When the union requested during negotiations whether there were plans to move any part of the operations, it was told "no" in very clear language. On the face of it, the transfer of this proportion of the work does not appear to be a transfer which would have a significant impact on the bargaining unit; this is especially so when the movement of service work would leave a clear space for the making of production hoods. In fact, for the most part, Plaza Fiberglas was able to supply adequate numbers of production hoods, but at the expense of service hood production. In that context, the company referred to the service work intended to be transferred to Citcor as "excess" work and thus not work done by the bargaining unit.

43. The process of making service and production hoods is the same except that production hoods are baked twice and service hoods only once with the result that service hoods take about half an hour less time to make. The two types of hoods are sent to different locations and service hoods are made with older molds. Once the equipment necessary to make service hoods is in place, however, hoods intended for new vehicles, rather than for repair, can easily be made. All that is necessary is to move the molds, a task which we can conclude from the evidence can be accomplished in fairly short order. Plaza Fiberglas has shipped service hoods for production purposes when requested by the customer. It is really the customers' needs which determine the use to which hoods are put and their needs change according to the demands of *their* customers. It is also evident that while Citcor is not capable of the same level of production as Plaza Fiberglas is, it is capable of a greater level than is required to satisfy the service demands alone as they existed at the operative time.

44. I am satisfied that at least by October 21st, if not before, the employer (through Mrs. Citron) contemplated transferring work which it should have foreseen could have "a real likelihood of significantly impacting on the bargaining unit" and as such should have been revealed to the union. Mrs. Citron testified that she had asked Mr. Gout on October 21st to start hiring people and had told him "we needed to work at a faster pace" at Citcor. A week or ten days before November 14th, she tried to assure her customers that she could supply about 30 per cent of their requirements. Whatever the intention when Mr. Gout started to prepare Citcor, by mid or late October, the employer anticipated that Citcor would be doing more than the so-called "excess" service work.

45. The development of the Citcor plant, intentionally or otherwise, made the November

move far easier and conceivably, even possible. It permitted Citcor to go into immediate production of both Navistar and Volvo GM work, although not to the satisfaction of Navistar, at least. It is hard to imagine a more dramatic example of a move which has had and which clearly would have a significant impact on the bargaining unit or more adverse impact on the majority of employees than the November move to Citcor. All the work was transferred to Citcor and some 45% of it was never returned to Plaza Fiberglas.

46. Was that move merely the realization of a strike contingency plan which the employer was entitled to put in place? An employer may attempt to continue its production in the case of a strike by hiring temporary replacement workers or by having management employees do the work. The employer's argument in this case is that it moved the work in order to continue production during the anticipated strike. As a bargaining ploy, Mr. Perquin gave the company the impression that the members were prepared to strike, but never actually said they would strike. The company's negotiating team reached its own conclusions that in the circumstances of this bargaining, with so many significant issues still outstanding as the strike/lock-out deadline approached, a strike would almost certainly occur. Mr. Gordon said that under the circumstances, he expected a strike. Mr. Perquin had stressed how important various issues were and how dissatisfied the employees were. In the event, the union did not strike and the members voted to continue bargaining. Mrs. Citron told us she was concerned that once a strike began, the customers would want their molds taken out of Plaza Fiberglas. She considered whether she could operate at Plaza Fiberglas during the strike, and had discussions with a security firm about doing so. She decided against that approach because she did not relish crossing a picket line or the difficulties in getting equipment in or out of the plant. Stockpiling was not a viable option in this context given the nature of the industry. Mr. Gordon reminded Mrs. Citron that the molds were the property of the customers and that she had a responsibility to take care of them, but testified that Mrs. Citron did not tell him that was why she had moved them.

47. I am satisfied that the employer and Mrs. Citron were in part motivated by a desire to continue production in the event the anticipated strike was realized. I also consider that none of the work was moved back until after Navistar demanded its work be returned to Plaza Fiberglas, even though Mr. Perquin told Mr. Gordon on November 14th that the union would not strike. (That does not mean, of course, that the union would not change its mind.) Volvo G.M.'s work has never been returned; as of the last day of hearing it was still being done at Citcor. Indeed, Mr. Gordon told the union late in November that the company intended to operate both Plaza Fiberglas and Citcor. In my view, the intention to produce a significant portion of the work at Citcor was sufficiently formed in October to require disclosure. While the timing of the November move suggests it was intended to forestall the impact of a strike, the conduct of the employer prior to the move and after it supports the view that the move was made at least in part to avoid any further dealings with the union.

48. Having regard to all the circumstances, I conclude that the move to Citcor on the November 11th weekend was contemplated as a move of the kind which requires disclosure under the principles articulated by the Board in the *Westinghouse* case, *supra*. Similarly, the impact of the planned movement of work over the summer and early fall was by mid to late October foreseeable such that it would or could have a significant impact on the bargaining unit and it, too, should have been disclosed. By that time, in fact, it was no longer possible to treat the two plans as discrete. The service work plan merged with the plan to move all the work to Citcor. To the extent that the plans could be seen as discrete, however, failure to disclose either plan was thus another example of the employer's bargaining in bad faith.

D. Direct Bargaining with Employees

49. The evidence is clear and Mrs. Citron admits that certain persons were hired at Plaza Fiberglas at starting rates above those in the collective agreement. For example, two forklift drivers, S. Nash and K. Itwaru, were paid \$10.00 instead of \$7.80 and a gelcoat sprayer, S. Garwood, was paid \$10.00 rather than \$8.32. A mold maker, Banwait Singh, was paid \$15.60 or \$16.00, with no corresponding rate in the collective agreement. They were hired or paid at rates above those provided in the collective agreement on the ground that the company needed those particular skills quickly and could not acquire them at the rates in the agreement. The company's classification proposal placed these employees in their own (new) classifications in order to permit the continued payment of the higher rates (with increases). Mrs. Citron claimed that she instructed management personnel to speak with the union about paying these rates, but apparently that was never done. Mr. Gordon, however, testified that she did not know she could not unilaterally pay above the collective agreement rates; even after she was informed she could not, the employees continued to receive higher rates.

50. It is also clear that members of management approached certain employees in the bargaining unit and offered them employment at Citcor after the lock-out had commenced. Counsel for the respondents argues that because only about five persons in total were involved, if selective hiring at Citcor is a violation, it is a *de minimis* violation and that furthermore, in hiring these persons, the employer and Mrs. Citron were motivated by a "kind" animus because they felt an obligation to long-term employees. The evidence does not support the inference that only long-term employees were hired at Citcor, but in any case, such a motive does not displace the fact that such selective hiring during the lock-out is another example of the employer's bypassing the union and bargaining directly with bargaining unit employees.

51. As the Board pointed out in *Inglis Limited*, [1977] OLRB Rep. Mar. 128, at paragraph 25, "[i]mplicit in the prohibition imposed by Section [64] of the Act in respect of direct bargaining between the company and the individual employee[s] is the requirement that the items bargained lie within the union's exclusive right of representation. It has never been suggested that Section [64] prohibits the company from offering employment outside the scope of the union recognition clause . . .". Thus in that case, the company did not violate the Act by not disclosing its plans to relocate, nor in dealing directly with the employees when it offered them jobs at the new location, because the relocation did not fall within the guidelines set out in the Board's jurisprudence as establishing a violation of the Act. In this case, however, the offer to the employees occurred during a lock-out which I find below to be unlawful.

52. The duty to bargain exclusively with the union continues after the lock-out. Direct bargaining with the employees in the bargaining unit is one further element in the employer's bargaining in bad faith under section 15 of the Act. Such direct bargaining is indicative of the employer's refusal to satisfy its obligation to recognize the Steelworkers as the exclusive bargaining agent of the employees. Bargaining outside the contours of the appropriate bargaining relationship militates against the parties being able to achieve a collective agreement in an atmosphere marked by good faith as required by the Act. While I do not conclude that the treatment of union members or supporters was different from the treatment of non-members or those opposed to the union (despite the apparent failure to hire two union supporters who applied for jobs at Citcor), the effect of the direct bargaining is to give the employees the impression that they cannot depend on the union and that the employer does not believe it needs to negotiate with the union to achieve its aims. As such, it also contravenes section 64 of the Act.

53. In addition to that direct contact with employees by the employer, Mrs. Citron dealt

directly with the employees when she was ordered to provide employees' addresses to the union by the Minister of Labour when he directed a final offer vote. It is not in dispute that Mrs. Citron decided that she would ask the employees whether they wanted their addresses revealed and would provide an address to the union only if the employee consented. Accordingly, she arranged for all the employees to be brought into her office on March 17, 1989, where each was required to fill in a form indicating whether he consented to the release of his address to the union.

54. Counsel for Mrs. Citron argues that the demand for addresses by the union was a provocative act intended to put Mrs. Citron at a disadvantage or, to use counsel's words, "to get [Mrs. Citron's] goat" because the union knew how Mrs. Citron felt about releasing addresses. As her counsel pointed out, Mrs. Citron had been found in contempt by the Divisional Court for failing to give documents in the form in which she had been ordered by the Board to provide them to the union during the course of the section 93 proceedings before me sitting alone: she had refused to reveal the addresses appearing on those documents without the individuals' consent. (See the Board's decision stating a case to the Divisional Court at [1989] OLRB Rep. May 479 and the Divisional Court's decision at [1989] OLRB Rep. May 528, leave to appeal dismissed at [1989] OLRB Reports June 707 (C.A.).) Regardless of her personal sensitivity on this issue, Mrs. Citron's conduct in this regard is another example of her failure to accept the union as the exclusive bargaining agent of the employees and therefore contravenes section 64 of the Act.

55. The union argued that the calling of employees to Mrs. Citron's office and requiring them to fill in the form contravenes section 70 of the Act. In *Keith MacLeod Sutherland*, [1983] OLRB Rep. July 1219, the Board stated, at paragraph 12, that "for intimidation or coercion to be established, there must be a threat or other intimidating or coercive action coupled with an express or implied demand that a person (for example) refrain from exercising a right under the Act or from performing an obligation under the Act". The standard for determining whether conduct by an employer has intimidated employees is not whether employees were actually intimidated, but whether a reasonable employee would feel intimidated or threatened in the circumstances; that is, it is an objective standard. Being called into the employer's office and asked whether one is willing to reveal information to the union not only undermines the relationship between employees and the union, but might well raise concerns for an employee who might reasonably wonder whether such a question is intended to discern where the employee's loyalty lies. Nevertheless, I am satisfied that Mrs. Citron was not demanding expressly or implicitly that the employees refrain from exercising a right under the Act or from performing an obligation under the Act and thus do not find a contravention under section 70, although, as indicated, such conduct does contravene section 64 of the Act.

56. I emphasize that my determination of this issue is based on the direct communication with the employees, not on the employer's failure to comply with the Minister's direction. As counsel for the employer and Mrs. Citron pointed out, the remedy from that perspective lies in the Minister's refusal to hold the vote requested by the employer, until the addresses are provided. The Board has no jurisdiction over a failure to comply with the Minister's direction made in connection with a request or a vote under section 40 of the Act. It does have jurisdiction to entertain allegations about conduct of the sort complained about here which happens to arise in the context of the section 40 request and it is that jurisdiction I have exercised in dealing with this aspect of the complaint.

E. The Back-to-Work Protocol

57. The union alleges that the back-to-work protocol established by the company when it returned Navistar's work to Plaza Fiberglas contravenes section 15 of the Act. The company began

to call back employees on the basis of need and departmental seniority. For example, laminators were called back first because their task is the first step in the production of hoods. Only employees who had been laminators at the time the lock-out commenced were recalled, based on departmental seniority. The union wanted any employee who could do the job to be called back, on the basis of the union's interpretation of the collective agreement. Both parties' positions were therefore consistent with their interpretation of the seniority clause in the collective agreement. As already indicated, the interpretation of the collective agreement is more properly the task of an arbitrator than of the Board.

58. There was also an allegation that even on the employer's interpretation of the seniority provision, some employees with greater seniority were not recalled before those with less. Both Mr. Khoja and Mr. Dipchan, who were involved in the recall, said they did not recall at least some people who were at Citcor; Mr. Dipchan testified that that was on the instruction of Mrs. Citron. I am satisfied that to the extent some employees were not recalled when they should have been, they were subsequently recalled and more junior employees were laid off. The parties dealt with this matter as a result of the union's complaint to the employer. I am not satisfied that any such failure to recall according to seniority constituted a contravention of the Act.

F. The Lock-out

59. Section 75 of the Act prohibits an employer from calling an unlawful lock-out. The remedies available are governed by subsection 89(4). Section 93 of the Act empowers the Board to make a declaration that an employer has called an illegal lock-out and to direct the employer to take or refrain from taking specific action in relation to the lock-out. Under the scheme of the Act, an attempt to enhance labour peace is made by restricting the periods during which unions may legally strike and employers may legally lock-out employees. Such provisions are consistent with the notion that employers and unions are to settle their disputes either through arbitration or recourse to the Board. In this case, the union alleges a violation of section 75 of the Act within the context of its first section 89 complaint and has also brought an application under section 93 of the Act.

60. The *Labour Relations Act* defines a lock-out as follows:

1(1) In this Act,

...

- (k) "lock-out" includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees;

61. As indicated, there is no dispute that the conduct complained of is a lock-out within the meaning of clause 1(1)(k) of the Act. Nor is it disputed that the lock-out is timely. A timely lock-out serving as a economic weapon to convince the union to agree to the company's proposals is not illegal. But

if a lock-out is imposed by an employer 'with a view to compel or induce his employees to refrain from exercising any rights . . . under this Act', it is illegal even if it is otherwise timely. . . The Board stated in *Westroc Industries Limited*, [1981] OLRB Rep. March 381 at 392:

“... a lock-out *aimed* at dissuading employees from exercising rights under the Act is never lawful and the concept of timeliness simply has no application to such activity.”
[emphasis added]

That aim need not be the sole, principal, or predominant one of the lock-out. It is sufficient to establish that a lock-out is unlawful, regardless of timeliness, if unlawful intent forms even a part of the motivation for the lock-out” (*Aristokraft Vinyl Inc.*, *supra*, at para. 28 [emphasis added in that case]).

62. Having regard to the employer’s conduct during bargaining, I am satisfied that the employer was motivated at least in part by the desire to undermine the union when locking out the employees. Mrs. Citron attempted to operate her business from Citcor rather than from Plaza Fiberglas; it was her intention to remove from the effect of the collective agreement the larger portion of the business covered by the agreement. She continued to try to make Citcor work until she was forced by pressure from Navistar to return its work to Plaza Fiberglas. By the time the hearing had been completed, a year after the lock-out had commenced, the work for Volvo GM remains at Citcor, outside the geographic scope of the bargaining unit. The compelling or inducing which is characteristic of a lock-out was not in respect of whether the company would continue to operate at the Plaza Fiberglas (or Chesswood) location, but rather whether (at least some of) the employees would agree to work at Citcor or the Citron Court location without union representation. To the extent that the decision to move appears to be irrevocable in that Mrs. Citron returned work only under pressure and has never returned some work, I note that “[a] permanent lock-out of bargaining unit employees would be very difficult to characterize as employer conduct aimed at achieving a collective agreement”: *Westroc Industries*, *supra*, at paragraph 19.

63. In my view, the nature of the lock-out indicates that it was less for the purpose of imposing economic pressure than for the purpose of undermining the union’s representation rights, and thus constitutes and reflects a fundamental unwillingness of the employer, resulting from Mrs. Citron’s own reluctance, to recognize the union as the exclusive bargaining agent of the employees. On this point, I observe that Mrs. Citron appeared to be operating in the belief that the union did not enjoy the support of the majority of employees. Although she denied saying it, I accept Mr. Khoja’s testimony that during discussions with Madan Sen Pydiah, the President of the local, on the morning of March 17th, before eliciting the employees’ agreement to release their addresses, Mrs. Citron commented that she knew half the employees did not want the union. Such a remark is consistent with her animosity from the beginning to a unionized workplace and her reluctance to accept the union as the employees’ exclusive bargaining agent. I am persuaded that one purpose of the move was to take away the union’s representational rights and to force it to reorganize the employees at the new location.

64. Section 72 of the Act deals with the timeliness of lock-outs and it seems clear that prohibitions against an employer’s locking-out an employee or threatening to do so must be seen in that context. Thus lock-outs which fall outside the temporal limits set by section 72 are illegal. In respect of lock-outs which are timely but nevertheless illegal in the sense referred to in *Westroc Industries*, *supra*, and *Aristokraft Vinyl*, *supra*, however, section 72 has no applicability. Neither the definition of “lock-out” in clause 1(1)(k) of the Act nor the prohibition under section 75 of the Act makes reference to timeliness either directly or by reference to section 72. While the conduct which grounds an unlawful lock-out may constitute a contravention of another section of the Act (in this case, section 64), it also constitutes a contravention of section 75 which is a substantive section invoked procedurally in this context by section 89 of the Act.

65. Accordingly, I find that the employer has engaged in an unlawful lock-out under section 75 of the Act.

66. A finding under section 89 that section 75 of the Act (which was specifically pleaded in this case) has been violated makes an assessment under section 93 redundant. Section 93 is an extraordinary section which permits a trade union to have an allegation of an illegal lock-out heard by a vice-chair sitting alone and therefore, in the normal course, it is scheduled more quickly than is a section 89 complaint. Both it and the parallel section 92 relating to illegal strikes are intended to expedite applications brought thereunder. If section 93 is to be effective, it must be reserved for matters requiring urgency. In this case, despite the Boards' efforts to expedite the matter, it became clear that the section 93 application was not being or could not be dealt with urgently. Taking into account the parties' merged treatment of the first section 89 complaint and the section 93 application, the fact that the remedy sought under section 93 can be granted under section 89, I therefore, in my discretion under section 93, dismiss the application under section 93 of the Act.

67. I hereby declare that the employer, Plaza Fiberglas and Plaza Electro-Plating, has contravened sections 15, 64, and 75 of the *Labour Relations Act* and that Citcor and Sabina Citron have contravened section 64 of the *Labour Relations Act*.

IV. Remedies

68. I turn now to the issue of remedies. Counsel for the employer argued that no order should be made against Plaza Electro-Plating should we find that the respondents or any of them has violated the Act. As already explained, Plaza Electro-Plating has been found to be a common employer with Plaza Fiberglas for the purposes of the Act. The following declarations and orders therefore apply to Plaza Electro-Plating as part of the entity constituting the employer in this case.

69. Counsel for Mrs. Citron argued that no remedies should be granted against Mrs. Citron personally because it would be embarrassing to her and would mean that the company would not attend renewed negotiations with the "sunniest of dispositions". Mrs. Citron is clearly the only significant decision-maker for the corporate respondents; I am satisfied that all the actions taken by the corporate respondents were at her direction or with her approval. The wording of sections 15 and 75 make it clear that they apply only to an employer (the latter with respect to calling an unlawful lock-out, at least), in contrast with section 64 which refers to a "person acting on behalf of an employer". Mrs. Citron is not an "employer" and neither section 15 nor section 75 apply to her in her individual capacity. Section 64 does apply to her, however, and to that extent, therefore, she is legally capable of and has been found to be in contravention of the Act by directing the movement of work and by bypassing the union and dealing directly with employees in contravention of section 64. (For similar reasons, in relation to the employees represented by the union, Citcor's actions in bargaining with the employees constitute a violation of section 64.)

70. I therefore order that the employer, Plaza Fiberglas and Plaza Electro-Plating, cease and desist from breaching sections 15, 64, and 75 of the Act and that Citcor and Sabina Citron cease and desist from breaching section 64 of the Act.

71. I direct that the employer, Plaza Fiberglas and Plaza Electro-Plating, convene a series of meetings between itself and the Steelworkers and bargain in good faith and make every reasonable effort to make a collective agreement with the union.

72. The union requested that we direct the employer to table a proposal containing the rates and conditions prevailing at Citcor and a back-to-work protocol in accordance with the terms and conditions of the expired collective agreement. Apart from the appropriateness of the Board's directing directly *or indirectly* under section 15 of the Act that a collective agreement be comprised of certain terms and conditions, my findings with respect to allegations of surface bargaining and

the allegations about the back-to-work protocol would make such a direction even more inappropriate in this case and I decline to grant that remedy.

73. I further direct that the employer, Plaza Fiberglas and Plaza Electro-Plating, Citcor and Mrs. Citron compensate all employees in the bargaining unit as of November 14, 1988, for all monetary losses arising reasonably out of the employer's, Citcor's and Mrs. Citron's violations of the Act, including interest payable in accordance with the principles set out in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35 (see Practice Note No. 13 of the Board's Practice Notes). As that case directs, in determining the amounts payable, the parties are to apply the principle of mitigation of damages.

74. I direct that the employer, Plaza Fiberglas and Plaza Electro-Plating, pay the union's reasonable negotiating costs arising out of the employer's violation of section 15 of the Act, but I decline to order the payment of the union's legal costs, seeing no reason to depart from the Board's usual practice in this respect.

75. The union also requested that we extend the union's certification to Citcor, following the Board in *Humpty Dumpty Foods Limited*, [1977] OLRB Rep. July 401, at paragraph 20. That course is not appropriate in the circumstances of this case. In *Humpty Dumpty Foods Limited*, *supra*, there was a threatened lock-out; in this case there was an actual lock-out which I find contravened section 75 of the Act. It is equally accurate to say here as it was in that case that "[t]he effect of the . . . lock-out in the instant case has been to induce or compel those in the employ of the employer at the time the threat was made to agree to work without benefit of the terms and conditions contained in the collective agreement negotiated with the company in addition to restricting the exercise of their right to collective representation under the Act". In that case, however, the same employer was involved in both the old and new locations. While the extensive involvement of Mrs. Citron in both Plaza Fiberglas and Plaza Electro-Plating, on the one hand, and Citcor, on the other, leads to the temptation to consider the two entities as related, and as personified in Mrs. Citron, the legal reality is that Citcor is a separate legal entity and a separate employer. Citcor has never been found under subsection 1(4) of the Act to be "one employer for the purposes of [the] Act" with Plaza Fiberglas and Plaza Electro-Plating.

76. I am satisfied that the only way to put the union in the same position it would have been had the employer (under sections 15 and 64) and Mrs. Citron (under section 64) not breached the Act, is to return the work to Plaza Fiberglas. Accordingly, I direct the employer and Mrs. Citron to return all the work moved to Citcor from Plaza Fiberglas back to Plaza Fiberglas, thereby bringing the employees performing the work under the scope of the collective agreement, and further direct that there be no further movement of work without disclosure by the employer to the union during bargaining for a renewal of the collective agreement, nor any further movement of work otherwise in contravention of the Act by the employer and/or by Mrs. Citron.

77. The union requests the addresses of employees at Plaza Fiberglas who were in the bargaining unit as of November 14, 1988 and of the employees at Citcor as of the date hereof for a period of one year or until the right of the union to addresses is included in the collective agreement. The union requested the addresses and telephone numbers of the employees in its July proposals. The provision of addresses was shown as agreed to in the company's November 29th proposals, although Mrs. Citron expressed dismay at seeing it so noted. Counsel for the union relied on *Co-Fo Concrete Forming Construction Ltd.*, [1987] OLRB Rep. Oct. 1213 for the proposition that the union requires the addresses in order to represent employees properly. At paragraph 29 of that decision, the Board states that the principles articulated in the cases which determine that a trade union is entitled to the names and hourly rates of employees in the bargaining unit for which

it is negotiating apply equally to the provision of addresses and telephone numbers as well. Such information is necessary to the union's "obligation to fairly represent *all* employees in the bargaining unit, both in collective bargaining and in the administration of any collective agreement". Furthermore,

[i]n making informed decisions and effectively performing its statutory responsibilities, information from the employees it represents can be as important to the trade union as the information the employer supplies. A trade union may need to communicate with some or all of the employees in the bargaining unit, including non-members of the union, in order to properly represent their interests: to get their input, to verify information supplied by the employer or to give notice of a strike or ratification vote . . . , for example. Information about how bargaining unit employees can be contacted is, thus, information to which the union is *prima facie* entitled.

78. The only reason we were given for not directing that addresses be provided is that this is a matter to which Mrs. Citron is particularly sensitive and therefore to require her to provide the addresses would be punitive. We are of the view that if the union is entitled to information, the employer's reluctance to provide it is not a reason not to direct that it be provided. Although *Co-Fo Concrete Forming, supra*, was decided under section 40a of the Act and in that context the failure to provide addresses was considered to be evidence of a "failure of the respondent to make reasonable . . . efforts to conclude a collective agreement" and of a "refusal of the employer to recognize the bargaining authority of the trade union" within the meaning of section 40a, I am persuaded that the reasoning in that case applies more generally. I note that we are not asked to determine and I am not determining whether a failure to provide addresses constitutes bargaining in bad faith within the meaning of section 15 of the Act. I am of the view that the addresses will be necessary to the union's ensuring that the employer has complied with the remedies set out herein and to the union's continued attempts to represent the employees in the bargaining unit. For that reason, I direct that the respondents provide the union with the addresses of bargaining unit employees at Plaza Fiberglas as of November 14, 1988 and to advise the union of changes of address when so advised until a collective agreement is signed.

79. The union has requested that a Notice to Employees and a copy of this decision be mailed by the employer to each employee in the bargaining unit as of November 14, 1988 and to all employees hired since that date at Citcor, and that the Notice and decision be posted at Citcor and Plaza Fiberglas. I have considered whether it is necessary to mail to employees who would see the posted decision. Plaza Fiberglas had ceased operating except in a very minor way before the hearing concluded. Posting notices at Plaza Fiberglas at least is clearly inadequate under those circumstances until the work is returned; even so, there are fewer employees at Citcor than were working at Plaza Fiberglas. A factor which applies to both locations is that employees have the opportunity to read the decision at their leisure and without concern for how their interest may be interpreted. Taking these factors into account, I direct that a copy of the Notice to Employees attached hereto as an Appendix and a copy of this decision be mailed by the employer to each employee in the bargaining unit as of November 14, 1988 and to each employee, who was not in the bargaining unit, who was hired at Citcor subsequent to that date. I further direct that the employer, Plaza Fiberglas and Plaza Electro-Plating, and Citcor post copies of the attached Notice in conspicuous places on their premises where they are likely to come to the attention of employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondents to ensure that the Notices are not altered or defaced or removed. Reasonable access shall be given to a representative of the Steelworkers to permit the union to satisfy itself that the posting requirements have been satisfied.

80. The union wants the Notice signed by Mrs. Citron on behalf of the employer and Citcor. Counsel for Mrs. Citron argued that we should direct that it be signed by a "representative" of

the company, as the Board directed in *Plastics CMP Limited*, [1982] OLRB Rep. May 726, because it would be “humiliating” for Mrs. Citron to sign it herself and would therefore be punitive. I am of the view that this is an appropriate case to name the person who is to sign on behalf of the corporate respondents. By so directing, I have no intention of humiliating Mrs. Citron, nor do I so direct because she might feel it would have that effect. Rather, I direct that Mrs. Citron sign on behalf of the corporate respondents because in the circumstances of this case, it is the only way in which the notice can be effective. The Board directs the posting (and/or mailing) of a notice of the sort attached hereto in order to inform the employees of their rights and of the remedies which have been ordered by the Board. It is intended to assure the employees that the Board is able to protect their rights. A representative of the employer is required to sign it to indicate acknowledgement by the employer that the employees do have those rights and that the Board has ordered those remedies. In doing so, the employer is not asked to agree with or approve any statement in the notice, but merely to show that it recognizes their reality. I have found that Mrs. Citron makes all the significant decisions for the employer and for Citcor; I am satisfied that it is only Mrs. Citron’s own signature which is truly “representative” of the company and which will signify to the employees that the employer and Citcor acknowledge the Board’s findings and orders. I therefore direct that the Notice to Employees be signed by Sabina Citron on behalf of Plaza Fiberglass and Plaza Electro-Plating and on behalf of Citcor. I have found that she is personally liable for violations of section 64 of the Act and therefore direct that she also sign the notice in her personal capacity.

81. After the hearing in these matters was finished, the Board received correspondence from the respondent ostensibly relating to the issues before the panel. I have reached my decision herein based solely and entirely on the evidence adduced before me during the hearing. In my view, it would be a rare occasion when a party should be able to reopen proceedings during the period the case is being decided. To do otherwise would be an invitation for parties to delay the resolution of the matter. There may be occasions when the parties are agreed that the Board should deal with events or submissions made subsequent to the completion of the hearing, and the panel also agrees it would be appropriate to do so; there may also be situations in which the panel believes it advisable to reopen the matter prior to reaching and releasing a decision. Neither of those circumstances pertains here. A party is, of course, free to seek to raise what it considers relevant matters following the release of a decision. My refusal to consider any matters brought to the panel’s attention at this stage is not to be treated as a determination on the relevance of the matters or on the outcome of any dispute arising out of them. Rather, I am concerned that, the hearing having been completed, these proceedings may become even more protracted than they have been.

82. The Board remains seized to deal with any matters arising out of the implementation of remedies or calculation of damages.

DECISION OF BOARD MEMBERS MARY ROZENBERG AND KAREN S. DAVIES; February 23, 1990

We concur with the findings, conclusions and remedies with respect to the section 89 complaints as stated in the decision of the chair of the panel.

Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A SERIES OF HEARINGS BEFORE THE BOARD. THE BOARD FOUND THAT PLAZA FIBERGLAS MANUFACTURING LTD. AND PLAZA ELECTRO-PLATING LTD. ("PLAZA") VIOLATED SECTIONS 15, 64 AND 75 OF THE LABOUR RELATIONS ACT AND CITCOR MANUFACTURING LTD. ("CITCOR") AND SABINA CITRON VIOLATED SECTION 64 OF THE ACT, AND HAS ORDERED US TO INFORM THE AFFECTED EMPLOYEES OF THEIR RIGHTS.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN, AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS.

WE WILL CEASE AND DESIST FROM VIOLATING THE ACT.

WE WILL FULLY COMPENSATE EMPLOYEES WHO LOST WAGES AND BENEFITS BECAUSE OF THE ILLEGAL LOCK-OUT.

WE WILL COMPENSATE THE UNITED STEELWORKERS OF AMERICA ("THE UNION") FOR ITS MONETARY LOSSES RESULTING FROM OUR VIOLATIONS OF THE ACT.

PLAZA WILL CONVENE FORTHWITH BARGAINING MEETINGS BETWEEN ITSELF AND THE UNION WILL BARGAIN IN GOOD FAITH AND MAKE EVERY REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT WITH THE UNION.

PLAZA WILL FORTHWITH PROVIDE THE UNION WITH A LIST OF THE NAMES AND ADDRESSES OF EMPLOYEES IN THE BARGAINING UNIT AS OF NOVEMBER 14, 1988 AND WILL ADVISE THE UNION OF CHANGES OF ADDRESSES WHEN SO ADVISED UNTIL A COLLECTIVE AGREEMENT IS SIGNED.

PLAZA FIBERGLAS MANUFACTURING LTD. AND PLAZA ELECTRO-PLATING LTD.

PER _____

CITCOR MANUFACTURING LTD.

SABINA CITRON

PER _____

PER _____

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 23RD day of FEBRUARY, 1990.

0859-89-G United Brotherhood of Carpenters and Joiners of America, Local 785, Applicant v. Rosmar Drywall & Acoustics Limited, Respondent

Construction Industry - Construction Industry Grievance - Health and Safety - Employer arranging health and safety training session for Workplace Hazardous Materials Information System on Friday afternoon - Session held at union hall and open to union members only - Union business representatives attending - Employer and union cooperating in providing refreshments - Occupational Health and Safety Act requiring employer to provide instructions but silent on payment - Employer failing to inform employees at meeting that attendance voluntary and unpaid - Employees entitled to wages and benefits for time at session

BEFORE: *R. A. Furness*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

APPEARANCES: *David McKee* and *Karl Ball* for the applicant; *David Gorelle* and *Al M. Beingssner* for the respondent.

DECISION OF THE BOARD; February 7, 1990

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.
2. In a previous decision in this matter dated July 27, 1989, the Board dismissed a motion by the respondent that this grievance is untimely. The Board proceeded to hear evidence and representations on the merits of this grievance.
3. The applicant has alleged that the respondent failed to pay wages and benefits to thirty-one members of the applicant who attended a WHMIS training programme on Friday, February 3, 1989, for four and a half hours between 1:00 p.m. and 5:30 p.m. The applicant alleged that the respondent had violated articles 6, 7, 9 and 10 of the Master Portion of the current collective agreement and/or the Acoustic and Drywall Appendix and any other relevant articles of that current collective agreement. The applicant requested that payment be made to it for all hours at the appropriate rate in the current collective agreement so that the applicant could distribute the same to its members. At the commencement of the hearing on the merits, the parties agreed that the Board determine the issue of liability, if any, and remain seized on the issue of the amount of wages and benefits which the respondent may be required to make. The applicant and the respondent agreed that they are bound by the provincial collective agreement between The Carpenters Employer Bargaining Agency and The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America effective June 23, 1988, to April 30, 1990 (the "collective agreement").
4. The Board heard testimony from Karl Ball, a business representative of the applicant and Kenneth Picken and Gerald Wilson owner/managers of the respondent.
5. The evidence established that Mr. Picken organized a WHMIS course. WHMIS is the acronym for "Workplace Hazardous Materials Information System". By virtue of a regulation under the *Occupational Health and Safety Act* certain duties of the workplace are set out with regard to labels, the provisions of material safety data sheets and worker training. It is the obligation of an employer under that Act to see that its employees are instructed in the use of hazardous materials in the workplace.
6. Mr. Picken contacted an instructor with the Construction Safety Association and dis-

cussed how to make the required knowledge available to the respondent's employees. Mr. Picken was informed that there were three methods, namely, a two and a half to three day course to which the respondent could send a key person to be trained as a qualified instructor; a four and a half hour to five hour course in order to become a card holder; and a half hour to one hour course for information training. Mr. Picken informed the Board that he chose the second method as a course to be offered to key personnel, office staff and union business representatives. He gave evidence that it was his intention to offer the third method of the one half hour to one hour course to the respondent's other employees. With a view to implementing his decision, he told the respondent's foremen at a foremen's meeting of his plans to arrange for a four and a half hour to five hour course. He also told the office staff of the course. It was Mr. Picken's testimony that the foremen and office staff were invited to attend on a voluntary basis. However, upon cross-examination of Mr. Picken and Mr. Wilson, it became clear that those who were present during the exchange of information would have understood that they were required to attend the course.

7. Mr. Picken was then faced with arranging for a place in which to hold the course. He asked Mr. Ball if the applicant's hall was available for the course. Mr. Ball informed him that the hall was available to anyone if they were union members. Mr. Picken assured Mr. Ball that those in attendance would be union members. The course was arranged to be given during the afternoon of Friday, February 3, 1989. Mr. Picken gave evidence that the foremen were told of the date some two weeks prior thereto and were instructed to close down the construction sites at noon on that date. With regard to the information conveyed to the employees, the evidence was much less satisfactory. Mr. Picken thought that the foremen probably told the employees the next day but "did not know for sure". The Board observes at this point that there was no evidence from a foreman or any employee as to what was actually said or the impression conveyed or received about the course to be held at the applicant's hall on February 3. Such evidence would have been extremely helpful and quite possibly determinative of this grievance. However, the facts which underlie this grievance will have to be gathered in part by the conduct of the parties with respect to events which occurred at the course on February 3.

8. Mr. Picken and Mr. Ball had agreed that the applicant's business representatives could and would attend the course. There was a further agreement that Mr. Ball would provide donuts and Mr. Picken would provide beer for the participants. Mr. Picken and Mr. Ball were expecting about twenty persons to attend the course. Mr. Picken ordered twenty-five guides for the course and Mr. Ball set up chairs for about twenty participants. On the afternoon of February 3 some forty-seven persons showed up with a view to attending the course. Mr. Picken and Mr. Ball were flabbergasted and the instructor was initially reluctant to proceed with the course. However, more chairs were set out, those present "buddied up" on the guides and the instructor gave the course to all who were in attendance. Cards were subsequently issued which set forth the names of the persons who were in attendance for the course.

9. It is the position of the applicant that the employees covered by the collective agreement ought to have been paid for the time spent attending the course. It is the position of the respondent that there was no violation of the collective agreement. In the alternative, the respondent argued that none of the grievors were directed to attend the course and so were not entitled to remuneration. In the further alternative, the respondent argued that it had planned for the grievors to attend the shortest of the three courses for non-foremen and that accordingly, any damages which are awarded ought to be limited to one hour's pay.

10. The issue before the Board is whether the thirty-one members of the applicant who attended the course on February 3, 1989, were employees of the respondent employed pursuant to the collective agreement and whether their status at the course was that of employees or volun-

teers? At the outset it is worth noting that the instruction of employees is an obligation imposed under the *Occupational Health and Safety Act*. Mr. Picken recognized this obligation and conceded it in his evidence. While there is no guidance in that legislation on the requirement to reimburse or pay wages, there is before the Board a guideline from an inspector under the *Occupational Health and Safety Act* to the effect that employees who receive the training ought to be paid. However, such a guideline does not have the force of law and is not determinative of this grievance under a collective agreement. The Board has considered the authorities referred to it by counsel. None of these authorities was on point. Duties inferred under other statutes and interpretations of various conduct under other collective agreements have not assisted the Board.

11. In the context of the construction industry, where employment relationships are constantly being created and re-created, an individual employer may well be reluctant to assume the cost of a safety programme which may fall disproportionately on its financial resources rather than be spread evenly in the industry or, indeed, shared by other parties. It is apparent that the respondent preferred to participate in the course without cost or at a minimal cost to itself. This grievance, however, goes beyond the intention of the respondent. This grievance involves an examination of the instructions received by the grievors with respect to the course.

12. As was stated previously, there was no evidence before the Board as to what was actually said to the employees on the various construction sites, prior to the shutdown on February 3. It appears that, at the very least, a problem occurred in communication between management and the employees (other than the foremen) on the twelve to fourteen sites. It was readily apparent to Mr. Picken that many employees were in attendance for the course. He could have cleared up the apparent lack of communication between management and these employees by informing them that they had not been invited and would not be paid for their time spent on the course. The Board readily understands the stated position of Mr. Picken that he felt he could not ask union members to leave their union hall. However, Mr. Picken could have made an announcement that they were not there by the direction of the respondent, that they were on their own time after midday and that they would not be paid for the time they spent on the course. He could have told the employees that they were to be offered the shortest course on the topic to be given on a subsequent date. There were so many ways management could have communicated to these employees. There is no evidence before the Board that it effectively communicated to these employees that their working day was over at midday on February 3 either prior to that point in time or subsequently when these employees accompanied their foremen to the union hall. While there is provision in the collective agreement for the exercise of management rights, such rights must be exercised *and* communicated to employees.

13. The Board finds that the respondent has violated the articles referred to in the grievance in the collective agreement and the Acoustic and Drywall Appendix thereto with respect to the employees covered therein including the foremen who may be also covered therein. The Board determines that the respondent pay the wages and various benefits required (and which have not been paid by reason of its violations of the collective agreement) to the applicant for distribution to the appropriate persons.

14. The Board remains seized with respect to any matter arising out of the implementation of the determination of the Board in this grievance.

0181-87-U Great Lakes Fishermen and Allied Workers' Union, Complainant v. Saco Fisheries Limited, Respondent

Judicial Review - Practice and Procedure - Remedies - Stay - Union letter to Board alleging employer not complying with Board order - Union seeking filing of Board order with Court for enforcement - Employer letter to Board arguing enforcement proceedings inappropriate while appeal on jurisdictional issue still before courts - Employer letter satisfying Board of non-compliance - Union entitled to enforcement in absence of Court stay, even if appeal or judicial review in progress - Board dispensing with non-compliance hearing and directing filing of decision with Court

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *R. M. Sloan* and *H. Peacock*.

DECISION OF THE BOARD; February 8, 1990

1. In a decision dated June 28, 1989 regarding this complaint under section 89 of the *Labour Relations Act*, another panel of the Board (comprised of Vice-Chair Patricia Hughes and Board Members R. M. Sloan and A. HersHKovitz) made the following determination (in paragraph 4):

... we hereby direct the respondent

(a) to pay to the complainant the following monies on behalf of the grievors as specified:

Paulo Gara	\$ 43,147.67
Armando Ferrierra	24,734.66
Julio Verissimio	29,430.97
Antonio Poupada	35,647.82
Tony Inacio	31,178.70
Citriano Pilo	59,603.02
Joao Bulhoes	<u>24,059.72</u>
TOTAL	\$247,802.56

(b) to pay the complainant interest on the above amounts at the rate of 10% per annum from and after the release of the Board's decision dated October 25, 1988.

2. On December 7, 1989, Lennox A. MacLean wrote to the Board as follows concerning that determination:

We have been retained by Great Lakes Fishermen and Allied Workers Union, now the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 444 to act on their behalf in the enforcement of the Board's decision herein dated June 28th, 1989.

Repeated demands have been made of the Respondent, Saco Fisheries Limited, but this company has refused and still refuses to comply with the Board's determination.

We are enclosing a copy of a letter which we sent to Saco Fisheries Limited dated July 7th, 1989, which along with the verbal demands for compliance both before and after this letter, have not resulted in any compliance with the Board's determination requiring payment of the sum of \$247,802.56.

In the circumstances, we respectfully request the Board pursuant to Section 89(6) of the *Labour Relations Act* to file in the office of the Registrar of the Supreme Court, a copy of the determination in the prescribed form so that it may become enforceable as a judgment of the court.

Also enclosed is a copy of the Board's determination which we would appreciate you filing in

the prescribed form in the Supreme Court as soon as possible. We also ask that you advise us as soon as the filing has been completed and provide us with a copy thereof.

Thanking you for your early attention to this matter.

3. A copy of that letter was sent to R. Gary McLister, in his capacity as counsel for the respondent, along with the following letter from the Board's Registrar, on December 13, 1989:

The Board is in receipt of the attached letter dated December 7, 1989 and enclosure, from counsel for the complainant, which alleges that the respondent has failed to comply with the terms of the decision of the Board dated June 28, 1989, directing the respondent to implement the terms of settlement therein set out.

If the respondent has any representations to make with respect to the submission of the complainant, it must file them with the Board not later than December 29, 1989.

If the respondent fails to file any submissions on or before that date, or if the Board is satisfied on the submission made to it that there has been non-compliance with the said Board decision, the Board will file the said decision in the Supreme Court pursuant to Section 89(6) of the Labour Relations Act.

4. Mr. McLister responded as follows in a letter dated December 19, 1989:

We find the letter sent to you dated December 7, 1989, most difficult to accept. No steps have been taken to implement the award because the issue of the Ontario Labour Relations Board's jurisdiction in these matters is still up in the air. The jurisdiction issue has been the subject of judicial review now under appeal before the Ontario Court of Appeal which argument is scheduled to be heard on January 11, 1990. It had already once been scheduled but the hearing had to be cancelled due to an administrative foul-up at the Court of Appeal. It was rescheduled, so we believe, on a relatively expedited basis.

No order for enforcement should be given until the Court of Appeal decision is received. If it is favourable to my client, no monies would be owing by it to the complainants.

In the event any steps are taken, then our client will seek an order staying all enforcement proceedings at the Court of Appeal. The Paroian law firm, and in particular Raymond Colautti of that firm, advises that he is of the opinion that the stay would be granted as reasonable in the circumstances. That firm is handling the jurisdictional challenge.

We note, moreover, that we are not aware of repeated demands. The union and its representatives have been aware of our positions regarding the jurisdictional issue and the enforcement of the Board's award since very shortly after the award was granted. Their counsel accepts that it is a serious issue.

Consequently, we request that no steps be taken at this time. Kindly advise of your decision in this regard so that whatever needs to be done can be done.

5. Mr. MacLean replied as follows in a letter dated January 16, 1990:

This will acknowledge our receipt of your letter of January 3rd, 1990, enclosing a letter from R. Gary McLister, counsel on behalf of Saco Fisheries Limited in which he takes exception to the Board registering this determination.

Apart from any other consideration, the Ontario Court of Appeal heard the appeal from the Divisional Court herein on January 11th and 12th, and has reserved judgment. It is my understanding of the opinion of at least one of the counsel who appeared before the court that it is likely that the Court of Appeal will render its judgment very soon in this matter.

In any event, it is quite clear that Saco Fisheries Limited has not obtained, nor indeed has it applied for any stay in the implementation of the Board's determination. Further, it is not insig-

nificant that thus far the employers who have been challenging the constitutional jurisdiction of the O.L.R.B. to certify the Union have been unsuccessful in that their application to the Divisional Court was dismissed.

It is trite law that unless and until a stay is issued by the court, the Board's decision remains enforceable.

In my respectful submission there is no basis at this time for the Board declining to register its determination pursuant to Section 89(6) of the Labour Relations Act.

6. Section 89(6) of the Act provides:

Where the trade union, council of trade unions, employer, employers' organization, person or employee, has failed to comply with any of terms of the determination, any trade union, council of trade unions, employer, employers' organization, person or employee, affected by the determination, may, after the expiration of fourteen days from the date of the release of the determination or the date provided in the determination for compliance, whichever is later, notify the Board in writing of such failure, and thereupon the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons therefor, if any, in the prescribed form, whereupon the determination shall be entered in the same way as a judgment or order of that court and is enforceable as such.

7. In *Apple Bee Shirts Limited*, [1983] OLRB Rep. Dec. 1957, the Board wrote, in part, as follows concerning that provision:

5. Although section 89(6) appears to suggest that the Board must file its determination with the Registrar of the Supreme Court upon being notified of a failure to comply with that order, the Board, with the approval of the Court (see *Chairtex Manufacturing* [1971] 3 O.R. 154) has required a party requesting that an order be filed under section 89 prove the fact of non-compliance. While it has been the Board's practice to schedule a hearing to deal with non-compliance, the Board has recently introduced a procedure whereby it advises the respondent of the allegation of the failure to comply, and permits the respondent to take issue with that allegation. However, where a respondent either agrees that there has been a failure to comply with the Board's determination or simply does not respond to the allegation that there has been a failure to comply with the Board order, the Board will file its determination with the Court pursuant to section 89(6) of the Act, because in the absence of any response, it will normally be satisfied that there has been a failure to comply.

8. The fourteen-day time period specified in section 89(6) has expired. Moreover, it is clear from the correspondence quoted above that the respondent has failed to comply with the Board's determination. Accordingly, the complainant is entitled to have a copy of the determination filed in the office of the Registrar of the Supreme Court, pursuant to section 89(6). In the absence of a Court order staying Board proceedings, an application for judicial review or an appeal in respect of such application does not preclude a complainant from availing itself of the enforcement procedure set forth in that provision. Furthermore, on January 16, 1990, the Ontario Court of Appeal dismissed the appeal referred to in the correspondence quoted above.

9. For the foregoing reasons, a copy of the Board's determination will forthwith be filed with the Registrar of the Supreme Court of Ontario pursuant to section 89(6).

**2235-89-R United Employees of Standard Industrial Technologies Inc., Applicant
v. Standard Industrial Technologies Inc., Respondent**

Certification - Trade Union Status - Officer of applicant testifying as to steps taken by employees to form trade union - Draft constitution reviewed, amended, and adopted - Terms of constitution sufficiently comprehensive to allow Board to conclude applicant viable organization formed for purposes of representing employees in their labour relations - Applicant falling within statutory definition of trade union

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *W. A. Correll* and *K. Davies*.

APPEARANCES: *Terence J. Billo* and *Chris Phipps* for the applicant; no one appearing for the respondent.

DECISION OF THE BOARD; February 7, 1990

1. This is an application for certification.
2. At the hearing in this matter the Board ruled orally that the applicant was a trade union and that a certificate should issue. The reasons for these rulings follow.
3. The applicant has not previously been found to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. Mr. C. Phipps, secretary-treasurer of the applicant gave evidence as to its origins.
4. Mr. Phipps has only been employed by the respondent for some 3 1/2 months. It appears, however, that employee interest in forming an association pre-dated Mr. Phipps' arrival.
5. In particular, a letter dated October 3, 1989 from applicant counsel to a Mr. Wipp, a former employee of the respondent, was filed in evidence. Counsel had also provided Mr. Wipp with a draft constitution. Counsel's letter outlined the steps to be taken at a meeting to form a trade union as follows:
 1. The proposal to create an employee association or trade union should first be discussed with the employees present.
 2. The spokesman can then introduce the draft constitution, indicating that the constitution is necessary to create a trade union. The provisions of the constitution can be reviewed and discussed at this time.
 3. A vote should be taken by a show of hands to determine if the majority of the employees in the bargaining unit are interested in creating the trade union.
 4. Assuming that the vote passes, employees should then be asked to sign the applications for membership in the association and pay the \$1.00 initiation fee. I provided you with sufficient copies of the combination application and receipt forms for everyone in the bargaining unit to sign. One individual (ideally yourself) should witness every signature on the applications and sign as a witness. That person should also collect \$1.00 from each of the applicants and sign the receipt on the second page. That person will be required to file a declaration with the Labour Board stating that he has personal knowledge of all the signatures and collection of initiation fees.
 5. If a majority of the employees in the bargaining unit join the association you can then convene the first meeting of the association. The first order of business would be to take a second vote by show of hands to ratify the adoption of the constitution.

6. You should then elect your executive officers pursuant to the constitution. Each name should be proposed, seconded and a vote be taken by show of hands. Results of all votes taken should be recorded in Minutes of the meeting which will be the responsibility of the secretary.
7. Finally, a motion should be made that application be made to the Ontario Labour Relations Board for certification of your association as the exclusive bargaining agent of all employees in the unit. This motion should again be seconded, voted on and recorded in the Minutes.

6. Mr. Phipps testified that he came into possession of both the letter and draft constitution referred to above. A meeting to discuss and form the applicant was held at Mr. Phipps' residence on the evening of November 16, 1989.

7. Mr. Phipps testified as to how the steps outlined in counsel's letter were followed at the meeting. In particular, the draft constitution was reviewed and a number of amendments were proposed and adopted. The constitution, as amended, was adopted. Employees in attendance at the meeting were then admitted as members of the organization upon written application for membership accompanied by the payment of a \$1.00 initiation fee. The constitution was then ratified and officers were elected pursuant to its terms.

8. The Board notes that the constitution includes terms indicating that its purposes include the regulation of relations between employees and the respondent employer through collective bargaining. In addition the constitution provides terms regarding the duties and election of officers, the holding of meetings, eligibility for membership, and finances. These various provisions are sufficiently comprehensive so as to allow this Board to conclude that the applicant is a viable organization formed for the purpose of representing employees in their labour relations.

9. In view of all of the above the Board is satisfied that the applicant has established its status as a trade union under section 1(1)(p) of the *Labour Relations Act*.

10. On the list of employees filed by the employer appeared the name Ian McLean. No specimen signature was provided by the employer with respect to any Ian McLean. A specimen signature was provided with respect to one John McLean, a name which did not appear on the employer list. On the basis of the evidence provided by the applicant, the Board is satisfied that Ian McLean and John McLean are one and the same person who is properly included on the list of employees.

11. The Board finds that all employees of the respondent in the City of Cambridge, save and except foremen, persons above the rank of foreman, sales office and clerical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. On the basis of the evidence before it the Board is satisfied that there were five full-time and one part-time employees in the bargaining unit at the time of the application.

13. The Board is further satisfied on the basis of all of the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 21, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant.

CASE LISTINGS JANUARY 1989

	PAGE
1. Applications for Certification	19
2. Applications for First Contract Arbitration	28
3. Applications for Declaration of Related Employer	28
4. Sale of a Business	28
5. Union Successor Rights	29
6. Applications for Declaration Terminating Bargaining Rights	29
7. Complaints of Unfair Labour Practice	29
8. Applications for Consent to Early Termination of Collective Agreement	32
9. Jurisdictional Disputes	32
10. Applications for Determination of Employee Status	32
11. Complaints under the Occupational Health and Safety Act	33
12. Environmental Protection Act	33
13. Construction Industry Grievances	33
14. Applications for Reconsideration of Board's Decision	36
15. Right of Access	36

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1990

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2468-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Inzola Construction (1976) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

2570-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Beaverbrook Estates Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

3109-88-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. P & M Electric (1982) Ltd., Northland Electric (Ont.) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all journeymen and apprentice electricians in the employ of P & M Electric (1982) Ltd. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (21 employees in unit)

0082-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Arosan Enterprises Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

1063-89-R: International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. Gilmar Electric Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all journeymen and apprentice electricians in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice electricians in the employ of the respondent in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1075-89-R: Canadian Union of Public Employees (Applicant) v. Vaughan Public Libraries (Respondent)

Unit: "all employees of the respondent in the Town of Vaughan, save and except branch heads, persons above the rank of branch head and section head, special projects librarian, administrative assistant, head of technical services, secretary to the chief executive officer, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (73 employees in unit) (*Having regard to the agreement of the parties*)

1472-89-R: Teamsters Local No. 230, Ready Mix, Building Supply, Hydro & Construction, Drivers, Warehousemen & Helpers affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Gormley Ready-Mix, A Division of Gormley Aggregates Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Township of King, save and except foremen, persons above the rank of foreman, dispatcher and office and sales staff" (11 employees in unit) (*Having regard to the agreement of the parties*)

1610-89-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Eastern Construction Company Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1865-89-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. General Meat Processing Inc. (Respondent)

Unit: "all employees of the respondent in the City of Waterloo, save and except supervisors, persons above the rank of supervisor, sales staff, office and clerical staff" (29 employees in unit) (*Having regard to the agreement of the parties*)

1982-89-R: Ontario Secondary School Teachers' Federation (OSSTF) (Applicant) v. The Carleton Board of Education (Respondent)

Unit: "all employees of the respondent in the Educational Services (Special Education) Department in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, office and clerical staff and employees in bargaining units for which any trade union held bargaining rights as of November 10th, 1989" (34 employees in unit) (*Having regard to the agreement of the parties*)

2023-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Macdero Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar,

and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (27 employees in unit) (*Clarity Note*)

2072-89-R: United Food & Commercial Workers International Union (Applicant) v. Primo Foods Ltd. (Respondent)

Unit: “all employees of the respondent at Bracebridge, save and except supervisors, persons above the rank of supervisor, office and sales staff and students employed during the school vacation period” (11 employees in unit) (*Having regard to the agreement of the parties*)

2076-89-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. T.L.C. Sudbury Retirement Lodges Ltd. Partnership (Respondent)

Unit #1: “all employees of the respondent in Sudbury, save and except registered nurses, persons above the rank of registered nurse, dietary supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (14 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in Sudbury regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered nurses, persons above the rank of registered nurse, dietary supervisor, office and clerical staff” (9 employees in unit) (*Having regard to the agreement of the parties*)

2114-89-R: Ontario Public Service Employees Union (Applicant) v. Sarnia-Lambton Centre for Children & Youth (Respondent)

Unit: “all employees of the respondent in the City of Sarnia, save and except supervisors, persons above the rank of supervisor, Secretary to the Executive Director and Secretary to the Board of Directors” (39 employees in unit) (*Having regard to the agreement of the parties*)

2141-89-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Norseman Drywall Ltd. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2146-89-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. T.G. Bright & Co. Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Niagara Falls, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and employees in bargaining units for which any trade union held bargaining rights as of November 27, 1989” (3 employees in unit) (*Having regard to the agreement of the parties*)

2153-89-R: Canadian Paperworkers Union (Applicant) v. Great Lakes Credit Union Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Thunder Bay, save and except managers, treasurer manager, loans manager, assistant treasurer manager and persons above the rank of managers, treasurer manager, loans manager and assistant treasurer manager” (9 employees in unit) (*Having regard to the agreement of the parties*)

2155-89-R: United Steelworkers of America (Applicant) v. Northern Plastics Ltd. (Respondent)

Unit: “all employees of the respondent in Hamilton, save and except forepersons, persons above the rank of

foreperson, office, sales and clerical staff" (35 employees in unit) (*Having regard to the agreement of the parties*)

2162-89-R: Retail, Wholesale & Department Store Union (Applicant) v. The Mellows (Stoney Creek) Corporation (Respondent) v. Groups of Employees (Objectors)

Unit: "all employees of the respondent in the City of Sault Ste. Marie, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except assistant hostess and persons above the rank of assistant hostess" (40 employees in unit) (*Having regard to the agreement of the parties*)

2165-89-R: United Food & Commercial Workers International Union, Local 633 (Applicant) v. Twin Food Mart Ltd. (Respondent)

Unit: "all employees of the respondent at its Blue Mountain IGA Division in the City of Collingwood employed in the meat Department, save and except the assistant store manager, persons above the rank of assistant store manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*)

2170-89-R: United Food & Commercial Workers International Union Local 175 (Applicant) v. Ontario Iron Workers & Rodmen Benefit Plan Administrators Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except managers, persons above the rank of manager, confidential secretary and persons regularly employed for not more than 24 hours per week" (11 employees in unit) (*Having regard to the agreement of the parties*)

2193-89-R: IWA-Canada (Applicant) v. Atway Transport Inc. (Respondent)

Unit: "all employees of the respondent employed as truck and transport drivers at and out of the District of Thunder Bay, save and except foremen, persons above the rank of foreman" (65 employees in unit) (*Having regard to the agreement of the parties*)

2203-89-R: Toronto Typographical Union, Local 91, affiliated local of the Communications Workers of America, Printing, Publishing & Media Workers Sector (Applicant) v. Salvation Army Triumph Press (Respondent)

Unit: "all employees of the respondent in the City of Oakville, save and except manager, persons above the rank of manager, editorial staff and employees in the bargaining units for which any trade union held bargaining rights as of December 6, 1989" (11 employees in unit) (*Having regard to the agreement of the parties*)

2207-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Spider-Maple Lift Ltd. and/or Spider Waste Management Services and/or Innisfil Landfill Corporation (Respondent)

Unit: "all employees of the respondent in the Township of Innisfil, save and except non-working foremen, and persons above the rank of non-working foreman" (3 employees in unit)

2215-89-R: Teamsters Local No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Apache Concrete Inc. (Respondent)

Unit: "all employees of the respondent at Mississauga, save and except foremen, persons above the rank of foreman, office, sales and dispatch staff, and students employed during the school vacation period" (16 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2223-89-R: Labourers' International Union of North America, Local 607 (Applicant) v. The Board of Management of the Nor-West Recreation Centre (Respondent)

Unit: "all employees of the respondent in the Municipality of Paipoonge, save and except managers, and those above the rank of manager" (12 employees in unit) (*Having regard to the agreement of the parties*)

2234-89-R: International Brotherhood of Electrical Workers, Local 402 (Applicant) v. Westinghouse Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent employed in its Services Division in the City of Thunder Bay, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, field services department staff and students employed during the school vacation period” (27 employees in unit) (*Having regard to the agreement of the parties*)

2275-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Geopac Inc. (Respondent)

Unit: “all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2280-89-R: Canadian Union of Postal Workers (Applicant) v. 419766 Ontario Ltd. c.o.b. Double MM Janitorial Services (Respondent)

Unit: “all employees of the respondent at 70 Trillium Drive, in the City of Kitchener, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

2295-89-R: The Behavioural Consultants Association of the Waterloo Board of Education (Applicant) v. The Waterloo County Board of Education (Respondent)

Unit: “all employees of the respondent employed as Behavioural Consultants and Speech Language Pathologists” (13 employees in unit) (*Having regard to the agreement of the parties*)

2304-89-R: The Kingston Air Handling Employees’ Association (Applicant) v. Haakon Industries (Canada) Ltd. (Respondent)

Unit: “all employees of the respondent in Kingston, Ontario, save and except foremen, persons above the rank of foreman, office, sales and clerical staff” (19 employees in unit) (*Having regard to the agreement of the parties*)

2305-89-R: Sheet Metal Workers’ International Association, Local 47 (Applicant) v. Martin Steel Metal, a Division of 806842 Ontario Ltd. (Respondent)

Unit: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in sectors of the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2308-89-R: Canadian Union of Public Employees (Applicant) v. Kirkland Lake District Association for the Mentally Retarded (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the District of Kirkland Lake, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and office staff” (17 employees in unit)

2342-89-R: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. The Fairway Group Inc. (Respondent)

Unit: "all employees of the respondent in its production department in the City of Kitchener, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except typesetting foreperson, pressroom foreperson, person above the rank of typesetting and pressroom foreperson" (10 employees in unit) (*Having regard to the agreement of the parties*)

2356-89-R: Canadian Union of Public Employees (Applicant) v. Heritage Manor Retirement Home Partnership (Respondent)

Unit: "all employees of the respondent in the City of Cornwall, save and except supervisors, persons above the rank of supervisor, registered, graduate and undergraduate nurses, administrator, office, and clerical staff, and students employed during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*)

2397-89-R: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. Universal Glass & Aluminum (Respondent)

Unit: "all glaziers and glaziers' apprentices in the employ of the respondent in the the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1816-89-R: Canadian Paperworkers Union (Applicant) v. Domtar Inc., Domtar Fine Paper Merchant Group (A Division of Domtar Pulp & Paper) Buntin Reid Paper (Respondent) v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 91 (Intervener)

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the defined school vacation period" (14 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	14
Number of persons who cast ballots	13
Number of ballots marked in favour of applicant	13
Number of ballots marked in favour of intervener	0

1878-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Feldmann Window Manufacturing Ltd. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Millworkers, Local 802 (Intervener)

Unit: "all employees of the respondent, save and except working foremen, persons above the rank of office, and sales staff, janitors, and part time and casual help employed during the school vacation period(s)" (79 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	91
Number of persons who cast ballots	79
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	77
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	74
Number of ballots marked in favour of intervener	2
Ballots segregated and not counted	2

1902-89-R: United Steelworkers of America (Applicant) v. Federal White Cement Ltd. (Respondent) v. Cement Lime Gypsum & Allied Workers Div. International Brotherhood of Boilermakers (Intervener)

Unit: "all production and maintenance employees of the respondent at its plant #1 in the Township of Zorra in the Province of Ontario, as defined by the Ontario Labour Relations Board, save and except foremen, persons above the rank of foreman, office and clerical employees (including maintenance

co-ordinator/storekeeper) and sales staff" (38 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	43
Number of persons who cast ballots	38
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	35
Number of ballots marked in favour of intervener	2
Ballots segregated and not counted	1

1944-89-R: I.U.O.E., Local 796 (Applicant) v. Hiram Walker & Sons Ltd. (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 100 (Intervener)

Unit: "all stationary engineers and persons primarily engaged as their helpers employed by the respondent at its power house in the City of Windsor, save and except chief engineer, persons above the rank of chief engineer, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (15 employees in unit)

Number of names of persons on list as originally prepared by employer	15
Number of persons who cast ballots	15
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	12
Number of ballots marked in favour of intervener	2

2000-89-R: Canadian Union of Public Employees (Applicant) v. The Wellesley Hospital (Respondent) v. The International Union of Operating Engineers, Local 796 (Intervener)

Unit: "all stationary employees, hospital equipment maintenance men and helpers who work under those classifications employed by of the The Wellesley Hospital at its hospital in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office employees and employees in bargaining units for which any trade union held bargaining rights other than the International Union of Operating Engineers, Local 796 as of November 10, 1989" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	19
Number of persons who cast ballots	16
Number of ballots marked in favour of applicant	15
Number of ballots marked in favour of intervener	1

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2022-89-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Hydro Electric Commission of the Borough of East York (Respondent) v. Group of Employees (Objectors)

Unit: "all office and technical employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, professional engineers, executive secretaries, personnel clerk, accountant, payroll clerk, persons regularly employed for not more than 24 hours per week and persons for whom any trade union held bargaining rights as of November 16, 1989" (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	19
Number of persons who cast ballots	18
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	8

Applications for Certification Dismissed Without Vote

2437-88-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Atcost Soil Drilling Inc. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) v. Group of Employees (Objectors) (14 employees in unit)

1761-89-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Waterloo County Board of Education (Respondent) (161 employees in unit)

1961-89-R: International Association of Machinists & Aerospace Workers, Thunder Bay Lodge 1120 (Applicant) v. Powell Equipment (1978) Ltd. (Respondent) (6 employees in unit)

1981-89-R: Ontario Secondary School Teachers' Federation (Applicant) v. Halton Board of Education (Respondent) (333 employees in unit)

2024-89-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Z Realty Company Ltd. (Respondent) (15 employees in unit)

2129-89-R: Energy & Chemical Workers Union (Applicant) v. The Consumers' Gas Company (Respondent) v. Group of Employees (Objectors) (100 employees in unit)

2288-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 507848 Ontario Ltd. c.o.b. as MORR-TEL Construction (Respondent) v. Group of Employees (Objectors) (employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2033-89-R: Teamsters, Local No. 419 (Applicant) v. Rockwood International Freight Inc. - Sales & Distribution Services (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto at 75 Horner Avenue, save and except supervisors, persons above the rank of supervisor, office and sales staff, and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	10
Number of persons who cast ballots	9
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	5

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1802-89-R: Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. Chaterways Transportation Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Mono Township, save and except dispatcher, persons above the rank of dispatcher, office and sales staff, mechanics and students employed during the school vacation period" (90 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	88
Number of persons who cast ballots	78
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	77
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	50
Ballots segregated and not counted	1

1887-89-R: Amalgamated Transit Union, Local 1587 (Applicant) v. The Corporation of the Town of Vaughan, and Tokmakjian Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent (Tokmakjian Limited) employed as bus drivers in the Municipal Public Transit System in the Town of Vaughan, save and except inspectors, persons above the rank of inspector, office and sales staff" (33 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	33
Number of persons who cast ballots	29
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	23

Applications for Certification Withdrawn

0009-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. The Hostess Frito-Lay Company (Respondent) v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Local No. 647, (Intervener)

1494-89-R: Labourers' International Union of North America, Local 506 (Applicant) v. James A. Rice Ltd. and 824014 Ontario Ltd. (Respondents)

1495-89-R: International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. James A. Rice Ltd. and 824014 Ontario Ltd. (Respondents)

1827-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. AJV Masonry Ltd. (Respondent)

1966-89-R: United Steelworkers of America (Applicant) v. Northern Plastics Ltd. (Respondent)

2021-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Rhucon (1988) Inc. (Respondent)

2081-89-R: Canadian Union of Public Employees (Applicant) v. Rideau Employee, Student Child Care Centre Inc. (Respondent)

2093-89-R: Energy & Chemical Workers Union (Applicant) v. Sarnia Public Library & Art Gallery (Respondent)

2097-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Groundation Chemicals Inc. and Groundation Engineering Contractors Inc. (Respondent)

2143-89-R: Service Employees' Union, Local 663 (Applicant) v. Lennox & Addington Addiction Services (Respondent)

2231-89-R: Canadian Union of Public Employees (Applicant) v. Governing Council of the University of Toronto (Respondent)

2251-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Cantak Corporation (Respondent)

2328-89-R: IWA-Canada (Applicant) v. Taiga Trucking Inc. (Respondent)

2583-89-R: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Dadcon Construction Ltd. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

1473-89-FC: IWA-Canada, Local 2693 (Applicant) v. MacMillan Bloedel Building Materials Ltd. (Respondent) (*Granted*)

1963-89-FC: International Union of Operating Engineers, Local 793 (Applicant) v. 657572 Ontario Inc. c.o.b. as Double S. Construction (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0744-89-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Lam Tech Wood Products Inc.; and Stack-A-Shelf (Respondents) (*Granted*)

0805-89-R: International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada, Local 357 (Applicant) v. Woodstock Amusements Inc., Stratford Amusements Inc. (Respondents) (*Granted*)

1127-89-R: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Ferracon Construction Ltd. and 638781 Ontario Inc. (Respondents) (*Granted*)

1128-89-R: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. 638781 Ontario Inc. (Respondent) (*Granted*)

1368-89-R: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Metro Century Construction Ltd., Chartex Construction Ltd., Mady-Wonsch Construction Ltd., and C. Mady Leaseholds Ltd. (Respondents) (*Withdrawn*)

1629-89-R: United Steelworkers of America (Applicant) v. Linda Lee and/or Abouttown Transportation Ltd. and/or 756979 Ontario Inc. (Respondents) (*Withdrawn*)

1867-89-R: Employees' Association of the Hammond Manufacturing Company Ltd. (Applicant) v. Hammond Manufacturing Company Ltd. and GFC Power Ltd. (Respondents) (*Withdrawn*)

2085-89-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Robert Laframboise Mechanical Ltd., Laframboise Plumbing & Heating Ltd., Robert Clare Enterprises Ltd., Ray Bolger Steel Fabrication Ltd., Cornwall Factory Surplus Ltd., Laframboise Industrial Maintenance & Welding a Division of Robert Clare Enterprises Ltd. (Respondents) (*Withdrawn*)

2225-89-R: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Keg Restaurants Ltd. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

0805-89-R: International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada, Local 357 (Applicant) v. Woodstock Amusements Inc., Stratford Amusements Inc. (Respondents) (*Granted*)

1127-89-R: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Ferracon Construction Ltd. and 638781 Ontario Inc. (Respondents) (*Dismissed*)

1128-89-R: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. 638781 Ontario Inc. (Respondent) (*Dismissed*)

1188-89-R: United Food & Commercial Workers International Union (Applicant) v. The Hostess Frito-Lay Company (Respondent) v. Group of Employees (Objectors) (*Granted*)

1368-89-R: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Metro Century Construction Ltd., Chartex Construction Ltd., Mady-Wonsch Construction Ltd., and C. Mady Leaseholds Ltd. (Respondents) (*Withdrawn*)

1867-89-R: Employees' Association of the Hammond Manufacturing Company Ltd. (Applicant) v. Hammond Manufacturing Company Ltd. and GFC Power Ltd. (Respondents) (*Withdrawn*)

2085-89-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Robert Laframboise Mechanical Ltd., Laframboise Plumbing & Heating Ltd., Robert Clare Enterprises Ltd., Ray Bolger Steel Fabrication Ltd., Cornwall Factory Surplus Ltd., Laframboise Industrial Maintenance & Welding a Division of Robert Clare Enterprises Ltd. (Respondents) (*Withdrawn*)

2225-89-R: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Keg Restaurants Ltd. (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

0591-89-R; 0592-89-R: Canadian Union of Public Employees (Applicant) v. The Hamilton-Wentworth Roman Catholic Separate School Board Professional Staff Association (Respondent) v. Group of Employees #1 & #2 (Objectors) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1993-89-R: Donovan Miller & Albert Freitas (Applicant) v. District Council, Toronto Cloakmakers, Dress and Sportswear Union of the International Ladies Garment Workers Union and Locals 14, 83 and 92 (Respondent) v. Antoinette Fashions Ltd./G.H. Sportswear Manufacturing Ltd. (Intervener) (62 employees in unit) (*Dismissed*)

2075-89-R: Glen Thurston (Applicant) v. United Steelworkers of America (Respondent) v. Trylon Manufacturing Company Ltd. (Intervener) (*Withdrawn*)

2128-89-R: Richard Horn (Applicant) v. CUPE, Local 1295 (Respondent) (*Withdrawn*)

2183-89-R: Clarence Edwin Muir (Applicant) v. Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 91 (Respondent) v. Acklands Ltd. by Uni-Select Inc. (Intervener) (7 employees in unit) (*Dismissed*)

2200-89-R: Boris Jovanovski (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 414 (Respondent) v. Columbia Lumber Company Ltd. (Mill) (Intervener) (72 employees in unit) (*Granted*)

2240-89-R: Robert A. Wallace (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1010-88-U: Hazael Winston Henry (Complainant) v. Canadian Union of Brewery & General Workers, Component 325 and Carling O'Keefe Breweries Ontario Ltd. (Respondents) (*Dismissed*)

1530-88-U; 1697-88-U: Teamsters Local No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Nedco, a Division of Westburne Industrial Enterprises Limited (Respondent) (*Withdrawn*)

3203-88-U: Labourers' International Union of North America, Local 527 (Complainant) v. Ottawa Board of Education; Ottawa Board of Education Employees Union (Respondents) (*Withdrawn*)

0264-89-U: Fred Button (Complainant) v. Mr. Brian White and Mr. William Dawson (Respondents) (*Withdrawn*)

0368-89-U; 0369-89-U: Anna Wilson (Complainant) v. Ontario Public Service Employees Union, Local 110 and Paddy Musson, Tom Geldard, Gary Fordyce, Larry Richardson, Lou Newell (Respondents) (*Dismissed*)

0447-89-U; 0986-89-U: United Brotherhood of Carpenters & Joiners of America, Local 2679 (Complainant) v. Geiger International (Respondent) (*Withdrawn*)

0745-89-U: United Brotherhood of Carpenters & Joiners of America (Complainant) v. Lam Tech Wood Products Inc. and Stack-A-Shelf (Respondent) (*Withdrawn*)

0851-89-U: International Brotherhood of Electrical Workers, Locals 1569 & 1551 (Complainants) v. The Hydro Electric Commission of the City of Ottawa (Respondent) (*Withdrawn*)

0857-89-U: Ann Wilson (Complainant) v. Ontario Public Service Employees Union, Paddy Musson, Ron Golemba, Ted Montgomery, Fernand Begin, Phil Cunningham, Joan Hastings-Dove, Bart Wesseling, and Andre Bekerman (Respondents) (*Dismissed*)

0861-89-U; 0867-89-U: Barry Casey (Complainant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

0933-89-U; 1020-89-U: Labourers' International Union of North America, Local 1059 (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 1946 (Respondent) (*Withdrawn*)

1074-89-U: Canadian Paperworkers Union (Complainant) v. Mel Hall Transport Ltd. and 444024 Ontario Ltd. (Respondents) (*Withdrawn*)

1110-89-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. 646254 Ontario Ltd. o/a Clifton Arms Hotel (Respondent) (*Withdrawn*)

1405-89-U: Frank Labalestra (Complainant) v. International Union of Operating Engineers, Local 796 (Respondent) (*Withdrawn*)

1520-89-U: Ontario Nurses' Association (Complainant) v. Extendicare Health Services Inc. (Respondent) (*Granted*)

1795-89-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. U-Need-A-Cab Ltd., M & M Holdings (Respondents) (*Withdrawn*)

1796-89-U: Canadian Guards Association, Local 117 (Complainant) v. McMaster University (Respondent) (*Withdrawn*)

1800-89-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Odstrum Manufacturing Company Ltd. (Respondent) (*Withdrawn*)

1806-89-U: Tohn Trinca (Complainant) v. Service Employees International Union, Local 204 (Respondent) (*Withdrawn*)

1836-89-U: Perry Grant Tracy (Employee) (Complainant) v. Turn Key Installations Inc. (Employer) (Respondent) (*Withdrawn*)

1837-89-U: United Steelworkers of America (Complainant) v. Bilt-Rite Upholstering Co. Ltd. (Respondent) (*Withdrawn*)

1854-89-U: Sheridan Gibson (Complainant) v. Teamsters Union, Local 938 (Respondent) (*Withdrawn*)

1855-89-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers Union of America (U.A.W.) and its Local 251 (Complainant) v. Benn Iron Foundry Ltd. (Respondent) (*Withdrawn*)

1876-89-U: International Beverage Dispensers' & Bartenders' Union of Hotel & Restaurant Employees' & Bartenders' International Union, Local 280 (Complainant) v. Commodore Tavern (Respondent) (*Withdrawn*)

1896-89-U; 1897-89-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. General Seating of Canada (Respondent) (*Withdrawn*)

1933-89-U: Hugh Alexander McLorinan (Complainant) v. Engineering Constructors' Association (Respondent) v. Swift Sure Courier, Dixhill Corp. & Steve McIntyre (Interveners) (*Dismissed*)

1950-89-U: Tim Wistow (Complainant) v. CAW, Local 27, Unit 17 (Respondent) v. Accuride Canada Inc. (Intervener) (*Withdrawn*)

1974-89-U: Heather Chance, Roland Champeau, Tim Gedke and other objecting employees of General Seating of Canada (Complainants) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) (*Withdrawn*)

1976-89-U: Ontario Public Service Employees Union (Complainant) v. Algonquin College (Respondent) (*Withdrawn*)

2011-89-U: Ontario Nurses' Association (Complainant) v. Sisters of St. Joseph of the Diocese of Peterborough in Ontario (Respondent) (*Withdrawn*)

2069-89-U: Gordon Hutton (Complainant) v. Fred Johnson - Teamsters Union, Local 938 (Respondent) (*Withdrawn*)

2077-89-U: Terry Krieger (Complainant) v. Benn Iron Foundry (Respondent) (*Withdrawn*)

2090-89-U: Hotels, Clubs, Restaurants, Taverns, Employees Union, Local 261 (Complainant) v. Clarion Hotel Roxborough (Respondent) (*Withdrawn*)

2104-89-U: IWA-Canada (Complainant) v. Gordon Trailer Sales & Rentals Ltd. (1989) (Respondent) v. Group of Employees (Objectors) (*Withdrawn*)

2109-89-U: Roderick W. Woolridge (Complainant) v. F.W. Woolworth Co. Ltd. (Respondent) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 414 (Intervener) (*Dismissed*)

2118-89-U: Tina Vandenburg R.N.A. (Complainant) v. Mr. Mike Tracy, President, Local 786 CUPE (Respondent) (*Withdrawn*)

2124-89-U: Energy & Chemical Workers Union (Complainant) v. Modern Building Cleaning (Respondent) (*Withdrawn*)

2138-89-U: Bob Grail (Complainant) v. Hiram Walker Security Supervisor Mr. Dick Saby and Hiram Walker Unit Director & Vice President, Local 1958 (Respondents) (*Withdrawn*)

2139-89-U: Duncan MacKenzie (Complainant) v. Ontario Public School Teachers' Federation (Respondent) (*Withdrawn*)

2163-89-U: Shawn Comer (Complainant) v. Hilroy (Respondent) (*Withdrawn*)

2169-89-U: Stephen Jenkins (Complainant) v. John Malcom Teamsters (Local 647) (Respondent) (*Withdrawn*)

2186-89-U: Canadian Union of Public Employees and its Local 65 (Complainant) v. Moulton Management Ltd., 370886 Ontario Ltd., et al (c.o.b. 'Fort Frances Clinic') (Respondent) (*Withdrawn*)

2197-89-U: IWA - Canada and Shawn Corbett (Complainants) v. Master Seal Windows (Custom Windows) Ltd. (Respondent) (*Withdrawn*)

2212-89-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. General Meat Processing Inc. (Respondent) (*Withdrawn*)

2255-89-U: Canadian Union of Public Employees (Complainant) v. University Settlement Recreation Centre (Respondent) (*Withdrawn*)

2341-89-U: Sheet Metal Workers, Local Union No. 540 (Complainant) v. Vulcan Equipment (Respondent) (*Dismissed*)

2349-89-U: International Union of Operating Engineers, Local 793 (Complainant) v. Ro-Von Construction Ltd. (Respondent) (*Withdrawn*)

2457-89-U: Forest Heights (Aurora) Inc. (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2364-89-M: Family Savings & Credit Union (Niagara) Ltd. (Employer) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), and its Local 374 (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

2572-88-JD: Commonwealth Construction Company (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 446, International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Respondents) (*Withdrawn*)

0205-89-JD: Commonwealth Construction Company, a Division of Guy F. Atkinson Holdings Ltd. (Complainant) v. Labourers' International Union of North America, Local 1036, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 508 (Respondents) (*Withdrawn*)

1088-89-JD: Harold R. Stark, division of William Stark Group Inc. (Complainant) v. Ontario Sheet Metal Workers Conference, Sheet Metal Workers' International Association, Local 392 and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1478-89-M: The City of Cornwall (Applicant) v. C.U.P.E., Local 3251 (Respondent) (*Withdrawn*)

1934-89-M: Canadian Union of Public Employees, Local 167 (Applicant) v. The Regional Municipality of Hamilton-Wentworth (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3084-88-OH: William James Kerr (Complainant) v. W.C. Wood Co. Ltd. (Respondent) (*Dismissed*)

0356-89-OH: United Brotherhood of Carpenters & Joiners of America, Local 2679 on behalf of workers listed in Schedule 'A' and the workers listed in Schedule 'A' (Complainant) v. Geiger International & Linda Evans (Respondents) (*Withdrawn*)

0815-89-OH: Everette Chapelle (Complainant) v. Toronto Transit Commission Wheel Trans Department (Respondent) (*Dismissed*)

1522-89-OH: Mike Mancu (Complainant) v. Reliance Electric Ltd., Dodge Canada Div. (Respondent) (*Withdrawn*)

1685-89-OH: Canadian Paperworkers Union and its Local 34 and Mr. Eric Louis-Seize and Mr. Yves Parent (Complainants) v. E.B. Eddy Forest Products Ltd. (Respondent) (*Withdrawn*)

1980-89-OH: Dean Timbers (Complainant) v. James Dick Construction (Respondent) (*Withdrawn*)

2003-89-OH: Canadian Union of Public Employees and his Local 576 (Complainant) v. The Ottawa Civic Hospital (Respondent) (*Withdrawn*)

2027-89-OH: Grantley H. Howell (Complainant) v. National Steel Car Ltd. (Respondent) (*Withdrawn*)

ENVIRONMENTAL PROTECTION ACT

2848-88-EP: Vinod Mohindra (Complainant) v. Bakelite Thermosets Ltd. (Respondent) (*Granted*)

CONSTRUCTION INDUSTRY GRIEVANCES

1208-86-M: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Doran Contractors Ltd., Taggart Construction Ltd. and Taggart General Contractors Ltd. (Respondents) (*Withdrawn*)

1846-88-G: United Brotherhood of Carpenters & Joiners of America, Local 1256 (Applicant) v. Piggott Construction Ltd. (Respondent) (*Withdrawn*)

2031-88-G: Labourers' International Union of North America (Applicant) v. New Investment Carpentry Ltd. (Respondent) (*Withdrawn*)

2033-88-G: Labourers' International Union of North America (Applicant) v. Keele Carpentry Ltd. (Respondent) (*Withdrawn*)

2201-88-G: United Brotherhood of Carpenters & Joiners of America, Local 446 (Applicant) v. Commonwealth Construction Company (Respondent) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Intervener) (*Withdrawn*)

2429-88-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. E.S. Fox Ltd. (Respondent) (*Granted*)

0185-89-G: United Brotherhood of Carpenters & Joiners of America, Local 1316 (Applicant) v. Losereit Sales & Services Ltd. (Respondent) (*Withdrawn*)

0329-89-G: Drywall, Acoustic Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Marel Contractors (Respondent) (*Granted*)

0524-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. B. Maskell Ltd. (Respondent) (*Withdrawn*)

0778-89-G: Ontario Sheet Metal Workers Conference and Sheet Metal Workers International Association, Local 392 (Applicant) v. Harold R. Stark, Division of William Stark Inc. (Respondent) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Intervener) (*Withdrawn*)

1080-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Unified Carpentry Ltd. (Respondent) (*Withdrawn*)

1383-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. Standard Drywall Ltd. (Respondent) (*Withdrawn*)

1408-89-G: International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. James A. Rice Ltd. (Respondent) (*Granted*)

1409-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. James A. Rice Ltd. (Respondent) (*Granted*)

1444-89-G: Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. 593601 Ontario Ltd. o/a Domingo's Contractor Carpenters (Respondent) (*Granted*)

1595-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Romeo Machine Shop (Respondent) (*Withdrawn*)

1755-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. XPRT Rebar Placers Inc. (Respondent) (*Withdrawn*)

1807-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Collingwood Plumbing Ltd. (Respondent) (*Granted*)

1858-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. McCall Contractors Inc. (Respondent) (*Withdrawn*)

1914-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Ed Brunet & Sons Ltd. (Respondent) (*Withdrawn*)

1953-89-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Humbelco Corporation (Respondent) (*Granted*)

1956-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Nat Interiors (Respondent) (*Withdrawn*)

1968-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Triple-M Services Demolition Experts and/or Consolidated Wrecking Company Ltd. (Respondent) (*Withdrawn*)

1988-89-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Adams & Cain Electric (Respondent) (*Withdrawn*)

2036-89-G: Ontario Sheet Metal Workers' Conference (Applicant) v. Lorlea Steels, A division of Jannock Steel Fabricating Company (Respondent) (*Granted*)

2037-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. Ellis-Don Ltd. (Respondent) (*Withdrawn*)

2041-89-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Ontario Store Fixtures Inc. (Respondent) (*Granted*)

2042-89-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Applicant) v. J & X Builders (Respondent) (*Granted*)

2046-89-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Centennial Railings Ltd. (Respondent) (*Withdrawn*)

2058-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Johnson Controls Ltd. (Respondent) (*Withdrawn*)

2059-89-G: Resilient Floor Workers, United Brotherhood of Carpenters & Joiners of America, Local 2965 (Applicant) v. Enka Contracting (Respondent) (*Withdrawn*)

2061-89-G: Resilient Floor Workers, United Brotherhood of Carpenters & Joiners of America, Local 2965 (Applicant) v. R. G. Kirby Construction (Respondent) (*Withdrawn*)

2086-89-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Robert Laframboise, Mechanical Ltd., Laframboise Plumbing & Heating Ltd., Robert Clare Enterprises Ltd., Ray Bolger Steel Fabrication Ltd., Cornwall Factory Surplus Ltd., Laframboise Industrial Maintenance & Welding, a Division of Robert Clare Enterprises Ltd. (Respondents) (*Withdrawn*)

2178-89-G: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. Rugged Air Systems Ltd. (Respondent) (*Granted*)

2216-89-G: International Brotherhood of Electrical Workers, Local 402 (Applicant) v. Peterson Electric Co. Ltd. (Respondent) (*Granted*)

2220-89-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. N.A.T. Interiors (Respondent) (*Withdrawn*)

2228-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Hadovic Construction Ltd. (Respondent) (*Withdrawn*)

2239-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. C.W. West Crane Service Ltd. (Respondent) (*Withdrawn*)

2241-89-G; 2244-89-G: Labourers' International Union of North America, Local 607 (Applicant) v. Jonroy Equipment Rentals Ltd. (Respondent) (*Withdrawn*)

2269-89-G: Millwright District Council of Ontario on its own behalf and on behalf of Local 1916 (Applicant) v. Cambridge Rigging Central Ltd. (Respondent) (*Granted*)

2270-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Shandon Associates Ltd. (Respondent) (*Granted*)

2271-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Unique Store Fixtures Ltd. (Respondent) (*Granted*)

2277-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ro-Von Construction Ltd. (Respondent) (*Withdrawn*)

2287-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Great Lakes Fabricating (Respondent) (*Withdrawn*)

2312-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Architectural

Contracting, D.M. Architectural Contracting Ltd., Monaco General Interior Contracting Inc., Sommantino Developments Inc. and Monaco Developments Inc. (Respondents) (*Granted*)

2340-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Ariss Construction Inc. (Respondent) (*Withdrawn*)

2407-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. McCall Contractors Inc. (Respondent) (*Withdrawn*)

2415-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. R & A Contracting 495494 Ontario Ltd. (Respondent) (*Granted*)

2416-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Freedom Valley Design Inc. (Respondent) (*Granted*)

2417-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Freedom Valley Design Inc. Structural Division (Respondent) (*Granted*)

2426-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. BCK (Eastern) Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0035-86-U: United Food & Commercial Workers International Union, Local 206 (Complainant) v. Knob Hill Farms Ltd. (Respondent) (*Withdrawn*)

0542-86-R: United Food & Commercial Workers International Union, Local 206 (Applicant) v. Knob Hill Farms Ltd. (Respondent) v. Group of Employees (Objectors) (*Withdrawn*)

1993-87-JD: International Longshoremen's Association, Local 1477 (Complainant) v. Canadian Paperworkers Union, Local 84 and Quebec & Ontario Paper Company Ltd. (Respondents) (*Dismissed*)

RIGHT OF ACCESS

2131-89-M: International Union of Operating Engineers, Local 793 (Applicant) v. M. J. Labelle Construction (Respondent) (*Granted*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

ISSN 0383-4778

CA20N
LR
054

Government
Publications

ONTARIO LABOUR RELATIONS BOARD REPORTS

March 1990



Ontario

ONTARIO LABOUR RELATIONS BOARD

<i>Chair</i>	M.G. MITCHNICK
<i>Alternate Chair</i>	R.O. MACDOWELL
<i>Vice-Chairs</i>	M. BENDEL
	L. DAVIE
	N.V. DISSANAYAKE
	R.A. FURNESS
	O.V. GRAY
	R.J. HERMAN
	B. HERLICH
	R.D. HOWE
	B. KELLER
	P. KNOPF
	J. McCORMACK
	M. NAIRN
	K. O'NEIL
	K. PETRYSHEN
	N.B. SATTERFIELD
	I.M. STAMP
	G. SURDYKOWSKI
	S.A. TACON

Members

J. ANDERSON	T. MEAGHER
B.L. ARMSTRONG	R.R. MONTAGUE
C.A. BALLENTINE	J.W. MURRAY
F.C. BURNET	W.S. O'NEILL
W.A. CORRELL	D.A. PATTERSON
K.S. DAVIES	H. PEACOCK
A.R. FOUCAULT	R.W. PIRRIE
W.N. FRASER	J. REDSHAW
W. GIBSON	K.V. ROGERS
P.V. GRASSO	J.A. RONSON
A. HERSHKOVITZ	M.A. ROSS
M. JONES	M. ROZENBERG
F. KELLY	J.A. RUNDLE
J. KENNEDY	G.O. SHAMANSKI
H. KOBRYN	R.M. SLOAN
J. KURCHAK	E.G. THEOBALD
J. LEAR	J. TRIM
D.A. MacDONALD	M. VUKOBRAT
W.J. McCARRON	S. WESLAK
C. McDONALD	W.H. WIGHTMAN
R.D. McMURDO	N.A. WILSON
	D.G. WOZNIAK

<i>Registrar</i>	T.A. INNISS
<i>Board Solicitors</i>	K.A. MacDONALD
	P.S. TOOP

ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1990] OLRB REP. MARCH

EDITOR: PERCY TOOP

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario

CASES REPORTED

1. Briston Fashions Inc. and Jay Garment Manufacturing Co. Ltd.; Re I.L.G.W.U. and Ontario Cloakmakers, Dress and Sportswear District Council of I.L.G.W.U.....	223
2. Bruce W. Smith Building Materials Ltd.; Re Teamsters' Union, Local No. 141; Re Group of Employees.....	226
3. Concrete Systems, 799316 Ontario Inc. c.o.b. as; Re L.I.U.N.A., Ontario Provincial District Council	229
4. Connell, David; Re Kruger Inc. and C.P.U.	230
5. Electrical Power Systems Construction Association, The; Re Ontario Allied Construction Trades Council and L.I.U.N.A. and Walter Fougere; Re Donald E. Hickey and Teamsters' Union	243
6. Gates, Frank; Re H. J. Heinz Company of Canada Ltd., U.F.C.W., Local 459	258
7. Gravel and Lake Services Limited; Re Roland Frayne, Neils Husman and Larry Duhaime; Re Prosper Brizzard, Richard Brizzard, Robert Casson, Richard Koski, David Jaggard, Manfred Krause, Robert Krause, David Ross, Aulus Tiitto, Darrell Westover, Raynard Jacobson, Bruce Nordstrom and Larry Jaggard; Re Wilf McIntyre, Fred Miron and I.W.A. - Canada, Local 2693	262
8. Holt-McDermott Mine, American Barrick Resources Corporation carrying on business as; Re U.S.W.A.; Re Group of Employees	267
9. I.B.E.W., and the International Brotherhood Construction Council of Ontario and the I.B.E.W., Local 115; Re Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario on behalf of all Contractor members of the Electrical Contractors Association of Quinte/St. Lawrence and the Electrical Contractors Association of Quinte/St. Lawrence	283
10. Kitchener Beverages Limited, a Group of Employees employed by; Re U.F.C.W.; Re Kitchener Beverages Limited	291
11. Nepean Bus Lines Inc.; Re Teamsters' Union, Local 91; Re Dave Loney	295
12. Northfield Metal Products Ltd.; Re G.M.P.; Re Dave Mikel and Group of Employees; Re G.M.P. (AFL-CIO-CLC).....	302
13. Ontario Hydro; Re The Society of Ontario Hydro Professional and Administrative Employees; Re The Coalition to stop the certification of the Society, on behalf of certain employees.....	305
14. Opera Ghost Productions Inc.; Re I.A.T.S.E., Theatrical Wardrobe Union, Local 822	325
15. Peterborough County Board of Education; Re C.U.P.E. and its Local 1680	330
16. Ridgewood Industries; Re Textile Processors, Service Trades, Health Care Professional and Technical Employees International Union, Local 351; Re U.S.W.A. and Objecting Employees	331
17. Stelco Fastener & Forging Co., Stelco Inc.; Re U.S.W.A., Locals 3767 and 3749; Re Fred J. Zicard.....	339
18. Stothers, Ted and Bruce Skreptak; Re B.B.F., Local 128; Re Hydra-Dyne Industrial Cleaning Services Ltd.	347



19.	Wackenhut of Canada Ltd.; Re U.S.W.A.	357
20.	Yola Construction Ltd. and K & Z Construction Ltd.; Re L.I.U.N.A., Local 506; Re B.A.C., Local 2	358

COURT PROCEEDINGS

1.	Consolidated-Bathurst Packaging Ltd.; Re I.W.A., Local 2-69; Re O.L.R.B.	369
2.	Empress Graphics Inc., Council of Printing Industries of Canada on behalf of, and Ontario Labour Relations Board; Re G.C.I.U., Local 500M.....	396

SUBJECT INDEX

- Abandonment - Bargaining Unit - Duty of Fair Representation - Unfair Labour Practice - Union and employer agreeing to exclusion of casual employees from collective agreement coverage in 1985 - Complainants employed as casuals in 1986 and 1987 - Complainants earning less than if covered by agreement and complaining of breach of duty of fair representation - Board dismissing complaint - Union abandonment of casual representation rights occurring before employment of complainants - Complainants not employees in bargaining unit which union continued to be entitled to represent - Abandonment of part of bargaining unit not *per se* breach of fair representation duty where not arbitrary, discriminatory, or in bad faith - Union estopped from asserting representation rights in any case
- STOTHERS, TED AND BRUCE SKREPTAK; RE B.B.F, LOCAL 128; RE HYDRA-DYNE INDUSTRIAL CLEANING SERVICES LTD..... 347
- Arbitration - Construction Industry - Construction Industry Grievance - Practice and Procedure - Employer seeking arbitration of claim against individual employees - Union and employees alleging that failure to serve grievance on individual employees meant no delivery on "other party" as required by Act - "Other party" is local union, even where relief sought against individual employee - Board dismissing one of grievances for delay in filing without reasonable explanation
- ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL AND L.I.U.N.A. AND WALTER FOUGERE; RE DONALD E. HICKEY AND TEAMSTERS' UNION 243
- Arbitration - Construction Industry - Construction Industry Grievance - Practice and Procedure - Union seeking advisory opinion on interpretation of collective agreement - Neither Union nor employer having taken action to assert their respective interpretations in concrete form - Grievance premature - Grievance dismissed without prejudice to refile in appropriate circumstances
- I.B.E.W., AND THE INTERNATIONAL BROTHERHOOD CONSTRUCTION COUNCIL OF ONTARIO AND THE I.B.E.W., LOCAL 115; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO ON BEHALF OF ALL CONTRACTOR MEMBERS OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF QUINTE/ST. LAWRENCE AND THE ELECTRICAL CONTRACTORS ASSOCIATION OF QUINTE/ST. LAWRENCE..... 283
- Bargaining Unit - Abandonment - Duty of Fair Representation - Unfair Labour Practice - Union and employer agreeing to exclusion of casual employees from collective agreement coverage in 1985 - Complainants employed as casuals in 1986 and 1987 - Complainants earning less than if covered by agreement and complaining of breach of duty of fair representation - Board dismissing complaint - Union abandonment of casual representation rights occurring before employment of complainants - Complainants not employees in bargaining unit which union continued to be entitled to represent - Abandonment of part of bargaining unit not *per se* breach of fair representation duty where not arbitrary, discriminatory, or in bad faith - Union estopped from asserting representation rights in any case
- STOTHERS, TED AND BRUCE SKREPTAK; RE B.B.F, LOCAL 128; RE HYDRA-DYNE INDUSTRIAL CLEANING SERVICES LTD..... 347
- Bargaining Unit - Certification - Construction Industry - Practice and Procedure - Reconsideration - Applicant requesting variation of clarity note in earlier certification decision - Clarity

II

note not part of unit description - Certificate issued subject to terms of Board decision, including any clarity note - Reconsideration denied

CONCRETE SYSTEMS, 799316 ONTARIO INC. C.O.B. AS; RE L.I.U.N.A.,
ONTARIO PROVINCIAL DISTRICT COUNCIL.....

229

Bargaining Unit - Certification - Practice and Procedure - Employer challenging inclusion of certain employees in bargaining unit on basis of community of interest - Employer requesting matter be heard by panel without exchange of pleadings - Hearings by panel liable to be inefficient use of resources where factual issues have not been narrowed by an officer inquiry or exchange of pleadings - Board directing inquiry by Labour Relations Officer

BRUCE W. SMITH BUILDING MATERIALS LTD.; RE TEAMSTERS' UNION,
LOCAL NO. 141; RE GROUP OF EMPLOYEE.....

226

Certification - Bargaining Unit - Construction Industry - Practice and Procedure - Reconsideration - Applicant requesting variation of clarity note in earlier certification decision - Clarity note not part of unit description - Certificate issued subject to terms of Board decision, including any clarity note - Reconsideration denied

CONCRETE SYSTEMS, 799316 ONTARIO INC. C.O.B. AS; RE L.I.U.N.A.,
ONTARIO PROVINCIAL DISTRICT COUNCIL.....

229

Certification - Bargaining Unit - Practice and Procedure - Employer challenging inclusion of certain employees in bargaining unit on basis of community of interest - Employer requesting matter be heard by panel without exchange of pleadings - Hearings by panel liable to be inefficient use of resources where factual issues have not been narrowed by an officer inquiry or exchange of pleadings - Board directing inquiry by Labour Relations Officer

BRUCE W. SMITH BUILDING MATERIALS LTD.; RE TEAMSTERS' UNION,
LOCAL NO. 141; RE GROUP OF EMPLOYEE.....

226

Certification - Evidence - Membership Evidence - Practice and Procedure - Trade union membership evidence lost in mail en route to Board - Union filing photocopies with Form 9 Declaration attesting to rigorous review and confirmation of validity of membership evidence - Board accepting photocopies as meeting requirements of Rules of Procedure - Photocopies backed by Declaration constituting "best evidence" under circumstances - Interim certificate issuing

HOLT-MCDERMOTT MINE, AMERICAN BARRICK RESOURCES CORPORATION CARRYING ON BUSINESS AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES .

267

Certification - Evidence - Trade Union - Trade Union Status - Board not satisfied that applicant organization had complied with International By-Laws in establishing Local Constitution - Applicant failing to file current International Constitution - Board unable to conclude whether applicant governed by Local or International Constitution - Board unable to conclude that applicant was "trade union" - Applicant filing photocopies of membership evidence - Photocopies not normally acceptable as membership evidence for certification in absence of satisfactory reasons why originals not available - Application dismissed

OPERA GHOST PRODUCTIONS INC.; RE I.A.T.S.E., THEATRICAL WARDROBE
UNION, LOCAL 822

325

Certification - Natural Justice - Practice and Procedure - Board failing to respond to petitioner request for local hearing - Petitioners not attending scheduled hearing in Toronto - Board declining to schedule additional hearing to consider statements of desire - Board posting in workplace gave notice of time and place of scheduled hearing and consequences of failure

to appear - Consequences also set out in Board Rules of Procedure - Petitioners not entitled to assume request for change of venue would be granted - Interim certificate issuing

HOLT-MCDERMOTT MINE, AMERICAN BARRICK RESOURCES CORPORATION CARRYING ON BUSINESS AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES . 267

Certification - Natural Justice - Practice and Procedure - Regular posting at employer's head office inadequate to give notice to all affected employees - Board directing employer to provide Board with employee address list for notice by mail

WACKENHUT OF CANADA LTD.; RE U.S.W.A. 357

Certification Where Act Contravened - Interference in Trade Union - Intimidation and Coercion - Unfair Labour Practice - Employer firing four union supporters and failing to retain another union supporter for training of replacement - Events occurring shortly after start of organizing campaign - Employees so intimidated by employer conduct that usual remedies unlikely to be effect - Vote unlikely to reveal true wishes - Union filing cards for approximately 25% of bargaining unit - Employer actions severe and at start of campaign - Substantial additional union support likely but for employer actions - Union having adequate support for collective bargaining - Certificate issuing

NEPEAN BUS LINES INC.; RE TEAMSTERS' UNION, LOCAL 91; RE DAVE LONEY 295

Collective Agreement - Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Employee objecting to early termination of collective agreement - Employee arguing Board should not decide early termination application until his fair representation complaint had been dealt with - Employee objecting to union handling of vote on employer's last offer - Employer threatening to shut down all three plants if concession package not agreed to for all locations - Union totalling votes from all 3 locations and agreeing to accept package - Union making honest "hard choice" - Union not obliged to take vote on acceptance of employer offer or to follow employee wishes - Union affirming early termination - Fair representation complaint not concerned with "open period" and not seeking matter relevant to Board's discretion - Fair representation complaint need not be heard first - Complaint dismissed - Early termination decision affirmed

STELCO FASTENER & FORGING CO., STELCO INC.; RE U.S.W.A., LOCAL 3767 AND 3749; RE FRED J. ZICARD 339

Collective Agreement - Termination - Union and employer applying for early termination of agreement - Early termination would shorten "open period" - Rival union conducting displacement campaign and objecting to early termination - Board unwilling to grant early termination where effect would be shortening of "open period" - Application dismissed

RIDGEWOOD INDUSTRIES; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; RE U.S.W.A. AND OBJECTING EMPLOYEES 331

Collective Agreement - Unfair Labour Practice - Union complaining of employer failure to accept insertion of statutory arbitration provision into agreement - Necessary threshold determination whether agreement was collective agreement to which Act applies - Elements of estoppel established - Public interest not requiring that agreement between employer and union be treated as collective agreement under Act if parties agree otherwise - Unfair to permit retroactive characterization of agreement such that employer would have refused to sign it had characterization been applied at the time - Union estopped from asserting agreement one covered by Act

ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE THE COALITION TO STOP THE CERTIFICATION OF THE SOCIETY, ON BEHALF OF CERTAIN EMPLOYEES 305

IV

Construction Industry - Arbitration - Construction Industry Grievance - Practice and Procedure - Employer seeking arbitration of claim against individual employees - Union and employees alleging that failure to serve grievance on individual employees meant no delivery on "other party" as required by Act - "Other party" is local union, even where relief sought against individual employee - Board dismissing one of grievances for delay in filing without reasonable explanation	
ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL AND L.I.U.N.A. AND WALTER FOUGERE; RE DONALD E. HICKEY AND TEAMSTERS' UNION	243
Construction Industry - Arbitration - Construction Industry Grievance - Practice and Procedure - Union seeking advisory opinion on interpretation of collective agreement - Neither Union nor employer having taken action to assert their respective interpretations in concrete form - Grievance premature - Grievance dismissed without prejudice to refile in appropriate circumstances	
I.B.E.W., AND THE INTERNATIONAL BROTHERHOOD CONSTRUCTION COUNCIL OF ONTARIO AND THE I.B.E.W., LOCAL 115; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO ON BEHALF OF ALL CONTRACTOR MEMBERS OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF QUINTE/ST. LAWRENCE AND THE ELECTRICAL CONTRACTORS ASSOCIATION OF QUINTE/ST. LAWRENCE	283
Construction Industry - Bargaining Unit - Certification - Practice and Procedure - Reconsideration - Applicant requesting variation of clarity note in earlier certification decision - Clarity note not part of unit description - Certificate issued subject to terms of Board decision, including any clarity note - Reconsideration denied	
CONCRETE SYSTEMS, 799316 ONTARIO INC. C.O.B. AS; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL	229
Construction Industry - Related Employer - Sale of a Business - Owner of defunct company obtaining ownership interest in existing business - No sale of business - No accompanying expertise or active participation such as to make him "key man" in existing business - Related employer declaration inappropriate - Applications dismissed	
YOLA CONSTRUCTION LTD. AND K & Z CONSTRUCTION LTD.; RE L.I.U.N.A., LOCAL 506; RE B.A.C., LOCAL 2	358
Construction Industry Grievance - Arbitration - Construction Industry - Practice and Procedure - Employer seeking arbitration of claim against individual employees - Union and employees alleging that failure to serve grievance on individual employees meant no delivery on "other party" as required by Act - "Other party" is local union, even where relief sought against individual employee - Board dismissing one of grievances for delay in filing without reasonable explanation	
ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL AND L.I.U.N.A. AND WALTER FOUGERE; RE DONALD E. HICKEY AND TEAMSTERS' UNION	243
Construction Industry Grievance - Arbitration - Construction Industry - Practice and Procedure - Union seeking advisory opinion on interpretation of collective agreement - Neither Union nor employer having taken action to assert their respective interpretations in concrete form	

- Grievance premature - Grievance dismissed without prejudice to refile in appropriate circumstances

I.B.E.W., AND THE INTERNATIONAL BROTHERHOOD CONSTRUCTION COUNCIL OF ONTARIO AND THE I.B.E.W., LOCAL 115; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO ON BEHALF OF ALL CONTRACTOR MEMBERS OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF QUINTE/ST. LAWRENCE AND THE ELECTRICAL CONTRACTORS ASSOCIATION OF QUINTE/ST. LAWRENCE 283

Duty of Fair Representation - Abandonment - Bargaining Unit - Unfair Labour Practice - Union and employer agreeing to exclusion of casual employees from collective agreement coverage in 1985 - Complainants employed as casuals in 1986 and 1987 - Complainants earning less than if covered by agreement and complaining of breach of duty of fair representation - Board dismissing complaint - Union abandonment of casual representation rights occurring before employment of complainants - Complainants not employees in bargaining unit which union continued to be entitled to represent - Abandonment of part of bargaining unit not *per se* breach of fair representation duty where not arbitrary, discriminatory, or in bad faith - Union estopped from asserting representation rights in any case

STOTHERS, TED AND BRUCE SKREPTAK; RE B.B.F, LOCAL 128; RE HYDRA-DYNE INDUSTRIAL CLEANING SERVICES LTD..... 347

Duty of Fair Representation - Collective Agreement - Practice and Procedure - Unfair Labour Practice - Employee objecting to early termination of collective agreement - Employee arguing Board should not decide early termination application until his fair representation complaint had been dealt with - Employee objecting to union handling of vote on employer's last offer - Employer threatening to shut down all three plants if concession package not agreed to for all locations - Union totalling votes from all 3 locations and agreeing to accept package - Union making honest "hard choice" - Union not obliged to take vote on acceptance of employer offer or to follow employee wishes - Union affirming early termination - Fair representation complaint not concerned with "open period" and not seeking matter relevant to Board's discretion - Fair representation complaint need not be heard first - Complaint dismissed - Early termination decision affirmed

STELCO FASTENER & FORGING CO., STELCO INC.; RE U.S.W.A., LOCAL 3767 AND 3749; RE FRED J. ZICARD 339

Duty of Fair Representation - Unfair Labour Practice - Employer reorganizing work - Reorganization leaving complainant performing work within two different bargaining units - Union representing both units - Union not challenging reorganization and seeking flexibility over work - Union entitled to assess competing interests of bargaining unit members in light of collective agreement - Complaint dismissed

GATES, FRANK; RE H. J. HEINZ COMPANY OF CANADA LTD., U.F.C.W., LOCAL 459 258

Employee - Employee Reference - Natural Justice - Parties - Only parties to a bargaining relationship may initiate employee reference - Persons whose status as "employees" at issue entitled to participate in proceedings - Such persons entitled to notice of application and of Officer's inquiry

PETERBOROUGH COUNTY BOARD OF EDUCATION; RE C.U.P.E. AND ITS LOCAL 1680..... 330

Employee Reference - Employee - Natural Justice - Parties - Only parties to a bargaining relationship may initiate employee reference - Persons whose status as "employees" at issue

entitled to participate in proceedings - Such persons entitled to notice of application and of Officer's inquiry	
PETERBOROUGH COUNTY BOARD OF EDUCATION; RE C.U.P.E. AND ITS LOCAL 1680.....	330
Evidence - Certification - Membership Evidence - Practice and Procedure - Trade union membership evidence lost in mail en route to Board - Union filing photocopies with Form 9 Declaration attesting to rigorous review and confirmation of validity of membership evidence - Board accepting photocopies as meeting requirements of Rules of Procedure - Photocopies backed by Declaration constituting "best evidence" under circumstances - Interim certificate issuing	
HOLT-MCDERMOTT MINE, AMERICAN BARRICK RESOURCES CORPORATION CARRYING ON BUSINESS AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES .	267
Evidence - Certification - Trade Union - Trade Union Status - Board not satisfied that applicant organization had complied with International By-Laws in establishing Local Constitution - Applicant failing to file current International Constitution - Board unable to conclude whether applicant governed by Local or International Constitution - Board unable to conclude that applicant was "trade union" - Applicant filing photocopies of membership evidence - Photocopies not normally acceptable as membership evidence for certification in absence of satisfactory reasons why originals not available - Application dismissed	
OPERA GHOST PRODUCTIONS INC.; RE I.A.T.S.E., THEATRICAL WARDROBE UNION, LOCAL 822	325
Final Offer Vote - Strike - Employer alleging union engaging in illegal strike by refusing to sign collective agreement reflecting employer's "final offer" - Union challenging Board's jurisdiction to deal with voter eligibility issues arising out of final offer votes - Union arguing only Minister has this authority - Board asserting jurisdiction - Act silent on disposition of final offer vote issues - Two-step approach of Minister determining vote and Board then determining complaint under Act would result in multiple proceedings and delay - Minister having no adjudicative powers under Act - Board jurisdiction consistent with its adjudicative powers and general structure of Act	
GRAVEL AND LAKE SERVICES LIMITED; RE ROLAND FRAYNE, NEILS HUSMAN AND LARRY DUHAIME; RE PROSPER BRIZZARD, RICHARD BRIZZARD, ROBERT CASSON, RICHARD KOSKI, DAVID JAGGARD, MANFRED KRAUSE, ROBERT KRAUSE; DAVID ROSS, AULIUS TIITTO, DARRELL WESTOVER, RAYNARD JACOBSON, BRUCE NORDSTROM AND LARRY JAGGARD; RE WILF MCINTYRE, FRED MIRON AND I.W.A. - CANADA, LOCAL 2693	262
First Contract Arbitration - Practice and Procedure - Termination - Board exercising discretion to determine order in which first contract arbitration application and termination application were to be considered - First contract application was filed first, proceedings adjourned for continuing negotiations, then bought back on after filing of termination application - Board directing first contract application to be dealt with first - Bumping first contract arbitration behind termination would provide parties in similar circumstances with little incentive to continue negotiations - Parties having already had three days of hearing with associated expense of first contract issue	
NORTHFIELD METAL PRODUCTS LTD.; RE G.M.P.; RE DAVE MIKEL AND GROUP OF EMPLOYEES; RE G.M.P. (AFL-CIO-CLC)	302
Interference in Trade Union - Certification Where Act Contravened - Intimidation and Coercion - Unfair Labour Practice - Employer firing four union supporters and failing to retain another union supporter for training of replacement - Events occurring shortly after start of organizing campaign - Employees so intimidated by employer conduct that usual remedies	

unlikely to be effect - Vote unlikely to reveal true wishes - Union filing cards for approximately 25% of bargaining unit - Employer actions severe and at start of campaign - Substantial additional union support likely but for employer actions - Union having adequate support for collective bargaining - Certificate issuing

NEPEAN BUS LINES INC.; RE TEAMSTERS' UNION, LOCAL 91; RE DAVE LONEY 295

Intimidation and Coercion - Certification Where Act Contravened - Interference in Trade Union - Unfair Labour Practice - Employer firing four union supporters and failing to retain another union supporter for training of replacement - Events occurring shortly after start of organizing campaign - Employees so intimidated by employer conduct that usual remedies unlikely to be effect - Vote unlikely to reveal true wishes - Union filing cards for approximately 25% of bargaining unit - Employer actions severe and at start of campaign - Substantial additional union support likely but for employer actions - Union having adequate support for collective bargaining - Certificate issuing

NEPEAN BUS LINES INC.; RE TEAMSTERS' UNION, LOCAL 91; RE DAVE LONEY 295

Judicial Review - Natural Justice - Practice and Procedure - Supreme Court of Canada finding no breach of natural justice for Board panel hearing case to discuss policy implications of a draft decision at Full Board meeting - Rules of natural justice should not discourage administrative bodies from taking advantage of accumulated experience of their members - Board justified in taking appropriate measures to ensure conflicting results not inadvertently reached in similar cases - Full Board being formalized consultation process which cannot be used to force or induce decision makers to adopt positions with which they do not agree - Procedure not giving rise to reasonable apprehension of bias - Parties having right to respond to any new ground arising at Full Board on which they have not made representations - Appeal dismissed

CONSOLIDATED-BATHURST PACKAGING LTD.; RE I.W.A., LOCAL 2-69; RE O.L.R.B. 369

Judicial Review - Strike - Union members refusing to perform "struck work" - Members of a sister local lawfully locked out by their employer - Collective agreement not requiring employees to handle "struck work" - Whether sympathetic strike contrary to Act - Work refusal properly characterized as a strike - Board issuing direction which may have an educational effect in the printing industry where "struck work" clauses are common - Divisional Court upholding Board decision - Application dismissed

EMPRESS GRAPHICS INC., COUNCIL OF PRINTING INDUSTRIES OF CANADA ON BEHALF OF, AND ONTARIO LABOUR RELATIONS BOARD; RE G.C.I.U., LOCAL 500M 396

Membership Evidence - Certification - Evidence - Practice and Procedure - Trade union membership evidence lost in mail en route to Board - Union filing photocopies with Form 9 Declaration attesting to rigorous review and confirmation of validity of membership evidence - Board accepting photocopies as meeting requirements of Rules of Procedure - Photocopies backed by Declaration constituting "best evidence" under circumstances - Interim certificate issuing

HOLT-MCDERMOTT MINE, AMERICAN BARRICK RESOURCES CORPORATION CARRYING ON BUSINESS AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES . 267

Natural Justice - Certification - Practice and Procedure - Board failing to respond to petitioner request for local hearing - Petitioners not attending scheduled hearing in Toronto - Board declining to schedule additional hearing to consider statements of desire - Board posting in workplace gave notice of time and place of scheduled hearing and consequences of failure

VIII

to appear - Consequences also set out in Board Rules of Procedure - Petitioners not entitled to assume request for change of venue would be granted - Interim certificate issuing	
HOLT-MCDERMOTT MINE, AMERICAN BARRICK RESOURCES CORPORATION CARRYING ON BUSINESS AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES .	267
Natural Justice - Certification - Practice and Procedure - Regular posting at employer's head office inadequate to give notice to all affected employees - Board directing employer to provide Board with employee address list for notice by mail	
WACKENHUT OF CANADA LTD.; RE U.S.W.A.....	357
Natural Justice - Employee - Employee Reference - Parties - Only parties to a bargaining relationship may initiate employee reference - Persons whose status as "employees" at issue entitled to participate in proceedings - Such persons entitled to notice of application and of Officer's inquiry	
PETERBOROUGH COUNTY BOARD OF EDUCATION; RE C.U.P.E. AND ITS LOCAL 1680.....	330
Natural Justice - Judicial Review - Practice and Procedure - Supreme Court of Canada finding no breach of natural justice for Board panel hearing case to discuss policy implications of a draft decision at Full Board meeting - Rules of natural justice should not discourage administrative bodies from taking advantage of accumulated experience of their members - Board justified in taking appropriate measures to ensure conflicting results not inadvertently reached in similar cases - Full Board being formalized consultation process which cannot be used to force or induce decision makers to adopt positions with which they do not agree - Procedure not giving rise to reasonable apprehension of bias - Parties having right to respond to any new ground arising at Full Board on which they have not made representations - Appeal dismissed	
CONSOLIDATED-BATHURST PACKAGING LTD.; RE I.W.A., LOCAL 2-69; RE O.L.R.B.....	369
Parties - Employee - Employee Reference - Natural Justice - Only parties to a bargaining relationship may initiate employee reference - Persons whose status as "employees" at issue entitled to participate in proceedings - Such persons entitled to notice of application and of Officer's inquiry	
PETERBOROUGH COUNTY BOARD OF EDUCATION; RE C.U.P.E. AND ITS LOCAL 1680.....	330
Petition - Termination - Circulators of petition holding positions closer to management than other employees - Board less inclined to draw inference adverse to voluntariness of petition in termination application than in certification application - Sufficient assurance of voluntariness in facts of case - Board directing representation vote	
KITCHENER BEVERAGES LIMITED, A GROUP OF EMPLOYEES EMPLOYED BY; RE U.F.C.W.; RE KITCHENER BEVERAGES LIMITED.....	291
Practice and Procedure - Arbitration - Construction Industry - Construction Industry Grievance - Employer seeking arbitration of claim against individual employees - Union and employees alleging that failure to serve grievance on individual employees meant no delivery on "other party" as required by Act - "Other party" is local union, even where relief sought against individual employee - Board dismissing one of grievances for delay in filing without reasonable explanation	
ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL AND L.I.U.N.A. AND WALTER FOUGERE; RE DONALD E. HICKEY AND TEAMSTERS' UNION	243

Practice and Procedure - Arbitration - Construction Industry - Construction Industry Grievance - Union seeking advisory opinion on interpretation of collective agreement - Neither Union nor employer having taken action to assert their respective interpretations in concrete form - Grievance premature - Grievance dismissed without prejudice to refile in appropriate circumstances	
I.B.E.W., AND THE INTERNATIONAL BROTHERHOOD CONSTRUCTION COUNCIL OF ONTARIO AND THE I.B.E.W., LOCAL 115; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO ON BEHALF OF ALL CONTRACTOR MEMBERS OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF QUINTE/ST. LAWRENCE AND THE ELECTRICAL CONTRACTORS ASSOCIATION OF QUINTE/ST. LAWRENCE.....	283
Practice and Procedure - Bargaining Unit - Certification - Construction Industry - Reconsideration - Applicant requesting variation of clarity note in earlier certification decision - Clarity note not part of unit description - Certificate issued subject to terms of Board decision, including any clarity note - Reconsideration denied	
CONCRETE SYSTEMS, 799316 ONTARIO INC. C.O.B. AS; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL.....	229
Practice and Procedure - Bargaining Unit - Certification - Employer challenging inclusion of certain employees in bargaining unit on basis of community of interest - Employer requesting matter be heard by panel without exchange of pleadings - Hearings by panel liable to be inefficient use of resources where factual issues have not been narrowed by an officer inquiry or exchange of pleadings - Board directing inquiry by Labour Relations Officer	
BRUCE W. SMITH BUILDING MATERIALS LTD.; RE TEAMSTERS' UNION, LOCAL NO. 141; RE GROUP OF EMPLOYEE.....	226
Practice and Procedure - Certification - Evidence - Membership Evidence - Trade union membership evidence lost in mail en route to Board - Union filing photocopies with Form 9 Declaration attesting to rigorous review and confirmation of validity of membership evidence - Board accepting photocopies as meeting requirements of Rules of Procedure - Photocopies backed by Declaration constituting "best evidence" under circumstances - Interim certificate issuing	
HOLT-MCDERMOTT MINE, AMERICAN BARRICK RESOURCES CORPORATION CARRYING ON BUSINESS AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES .	267
Practice and Procedure - Certification - Natural Justice - Board failing to respond to petitioner request for local hearing - Petitioners not attending scheduled hearing in Toronto - Board declining to schedule additional hearing to consider statements of desire - Board posting in workplace gave notice of time and place of scheduled hearing and consequences of failure to appear - Consequences also set out in Board Rules of Procedure - Petitioners not entitled to assume request for change of venue would be granted - Interim certificate issuing	
HOLT-MCDERMOTT MINE, AMERICAN BARRICK RESOURCES CORPORATION CARRYING ON BUSINESS AS; RE U.S.W.A.; RE GROUP OF EMPLOYEES .	267
Practice and Procedure - Certification - Natural Justice - Regular posting at employer's head office inadequate to give notice to all affected employees - Board directing employer to provide Board with employee address list for notice by mail	
WACKENHUT OF CANADA LTD.; RE U.S.W.A.....	357
Practice and Procedure - Collective Agreement - Duty of Fair Representation - Unfair Labour Practice - Employee objecting to early termination of collective agreement - Employee arguing Board should not decide early termination application until his fair representation	

complaint had been dealt with - Employee objecting to union handling of vote on employer's last offer - Employer threatening to shut down all three plants if concession package not agreed to for all locations - Union totalling votes from all 3 locations and agreeing to accept package - Union making honest "hard choice" - Union not obliged to take vote on acceptance of employer offer or to follow employee wishes - Union affirming early termination - Fair representation complaint not concerned with "open period" and not seeking matter relevant to Board's discretion - Fair representation complaint need not be heard first - Complaint dismissed - Early termination decision affirmed

STELCO FASTENER & FORGING CO., STELCO INC.; RE U.S.W.A., LOCAL 3767 AND 3749; RE FRED J. ZICARD.....

339

Practice and Procedure - First Contract Arbitration - Termination - Board exercising discretion to determine order in which first contract arbitration application and termination application were to be considered - First contract application was filed first, proceedings adjourned for continuing negotiations, then bought back on after filing of termination application - Board directing first contract application to be dealt with first - Bumping first contract arbitration behind termination would provide parties in similar circumstances with little incentive to continue negotiations - Parties having already had three days of hearing with associated expense of first contract issue

NORTHFIELD METAL PRODUCTS LTD.; RE G.M.P.; RE DAVE MIKEL AND GROUP OF EMPLOYEES; RE G.M.P. (AFL-CIO-CLC)

302

Practice and Procedure - Judicial Review - Natural Justice - Supreme Court of Canada finding no breach of natural justice for Board panel hearing case to discuss policy implications of a draft decision at Full Board meeting - Rules of natural justice should not discourage administrative bodies from taking advantage of accumulated experience of their members - Board justified in taking appropriate measures to ensure conflicting results not inadvertently reached in similar cases - Full Board being formalized consultation process which cannot be used to force or induce decision makers to adopt positions with which they do not agree - Procedure not giving rise to reasonable apprehension of bias - Parties having right to respond to any new ground arising at Full Board on which they have not made representations - Appeal dismissed

CONSOLIDATED-BATHURST PACKAGING LTD.; RE I.W.A., LOCAL 2-69; RE O.L.R.B.....

369

Reconsideration - Bargaining Unit - Certification - Construction Industry - Practice and Procedure - Applicant requesting variation of clarity note in earlier certification decision - Clarity note not part of unit description - Certificate issued subject to terms of Board decision, including any clarity note - Reconsideration denied

CONCRETE SYSTEMS, 799316 ONTARIO INC. C.O.B. AS; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL.....

229

Related Employer - Construction Industry - Sale of a Business - Owner of defunct company obtaining ownership interest in existing business - No sale of business - No accompanying expertise or active participation such as to make him "key man" in existing business - Related employer declaration inappropriate - Applications dismissed

YOLA CONSTRUCTION LTD. AND K & Z CONSTRUCTION LTD.; RE L.I.U.N.A., LOCAL 506; RE B.A.C., LOCAL 2

358

Related Employer - Sale of a Business - Fashion tailoring business transferred as functional entity

- Original employer continuing to exist as contracting company - Sale of business declaration issuing	
BRISTON FASHIONS INC. AND JAY GARMENT MANUFACTURING CO. LTD.; RE I.L.G.W.U. AND ONTARIO CLOAKMAKERS, DRESS AND SPORTSWEAR DISTRICT COUNCIL OF I.L.G.W.U.	223
Sale of a Business - Construction Industry - Related Employer - Owner of defunct company obtaining ownership interest in existing business - No sale of business - No accompanying expertise or active participation such as to make him "key man" in existing business - Related employer declaration inappropriate - Applications dismissed	
YOLA CONSTRUCTION LTD. AND K & Z CONSTRUCTION LTD.; RE L.I.U.N.A., LOCAL 506; RE B.A.C., LOCAL 2	358
Sale of a Business - Related Employer - Fashion tailoring business transferred as functional entity - Original employer continuing to exist as contracting company - Sale of business declaration issuing	
BRISTON FASHIONS INC. AND JAY GARMENT MANUFACTURING CO. LTD.; RE I.L.G.W.U. AND ONTARIO CLOAKMAKERS, DRESS AND SPORTSWEAR DISTRICT COUNCIL OF I.L.G.W.U.	223
Strike - Final Offer Vote - Employer alleging union engaging in illegal strike by refusing to sign collective agreement reflecting employer's "final offer" - Union challenging Board's jurisdiction to deal with voter eligibility issues arising out of final offer votes - Union arguing only Minister has this authority - Board asserting jurisdiction - Act silent on disposition of final offer vote issues - Two-step approach of Minister determining vote and Board then determining complaint under Act would result in multiple proceedings and delay - Minister having no adjudicative powers under Act - Board jurisdiction consistent with its adjudicative powers and general structure of Act	
GRAVEL AND LAKE SERVICES LIMITED; RE ROLAND FRAYNE, NEILS HUSMAN AND LARRY DUHAIME; RE PROSPER BRIZZARD, RICHARD BRIZZARD, ROBERT CASSON, RICHARD KOSKI, DAVID JAGGARD, MANFRED KRAUSE, ROBERT KRAUSE; DAVID ROSS, AULIUS TIITTO, DARRELL WEST-OVER, RAYNARD JACOBSON, BRUCE NORDSTROM AND LARRY JAGGARD; RE WILF MCINTYRE, FRED MIRON AND I.W.A. - CANADA, LOCAL 2693	262
Strike - Judicial Review - Union members refusing to perform "struck work" - Members of a sister local lawfully locked out by their employer - Collective agreement not requiring employees to handle "struck work" - Whether sympathetic strike contrary to Act - Work refusal properly characterized as a strike - Board issuing direction which may have an educational effect in the printing industry where "struck work" clauses are common - Divisional Court upholding Board decision - Application dismissed	
EMPRESS GRAPHICS INC., COUNCIL OF PRINTING INDUSTRIES OF CANADA ON BEHALF OF, AND ONTARIO LABOUR RELATIONS BOARD; RE G.C.I.U., LOCAL 500M	396
Termination - Collective Agreement - Union and employer applying for early termination of agreement - Early termination would shorten "open period" - Rival union conducting displacement campaign and objecting to early termination - Board unwilling to grant early termination where effect would be shortening of "open period" - Application dismissed	
RIDGEWOOD INDUSTRIES; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; RE U.S.W.A. AND OBJECTING EMPLOYEES	331
Termination - First Contract Arbitration - Practice and Procedure - Board exercising discretion to	

- determine order in which first contract arbitration application and termination application were to be considered - First contract application was filed first, proceedings adjourned for continuing negotiations, then brought back on after filing of termination application - Board directing first contract application to be dealt with first - Bumping first contract arbitration behind termination would provide parties in similar circumstances with little incentive to continue negotiations - Parties having already had three days of hearing with associated expense of first contract issue
- NORTHFIELD METAL PRODUCTS LTD.; RE G.M.P.; RE DAVE MIKEL AND GROUP OF EMPLOYEES; RE G.M.P. (AFL-CIO-CLC) 302
- Termination - Petition - Circulators of petition holding positions closer to management than other employees - Board less inclined to draw inference adverse to voluntariness of petition in termination application than in certification application - Sufficient assurance of voluntariness in facts of case - Board directing representation vote
- KITCHENER BEVERAGES LIMITED, A GROUP OF EMPLOYEES EMPLOYED BY; RE U.F.C.W.; RE KITCHENER BEVERAGES LIMITED 291
- Trade Union - Certification - Evidence - Trade Union Status - Board not satisfied that applicant organization had complied with International By-Laws in establishing Local Constitution - Applicant failing to file current International Constitution - Board unable to conclude whether applicant governed by Local or International Constitution - Board unable to conclude that applicant was "trade union" - Applicant filing photocopies of membership evidence - Photocopies not normally acceptable as membership evidence for certification in absence of satisfactory reasons why originals not available - Application dismissed
- OPERA GHOST PRODUCTIONS INC.; RE I.A.T.S.E., THEATRICAL WARDROBE UNION, LOCAL 822 325
- Trade Union Status - Certification - Evidence - Trade Union - Board not satisfied that applicant organization had complied with International By-Laws in establishing Local Constitution - Applicant failing to file current International Constitution - Board unable to conclude whether applicant governed by Local or International Constitution - Board unable to conclude that applicant was "trade union" - Applicant filing photocopies of membership evidence - Photocopies not normally acceptable as membership evidence for certification in absence of satisfactory reasons why originals not available - Application dismissed
- OPERA GHOST PRODUCTIONS INC.; RE I.A.T.S.E., THEATRICAL WARDROBE UNION, LOCAL 822 325
- Unfair Labour Practice - Abandonment - Bargaining Unit - Duty of Fair Representation - Union and employer agreeing to exclusion of casual employees from collective agreement coverage in 1985 - Complainants employed as casuals in 1986 and 1987 - Complainants earning less than if covered by agreement and complaining of breach of duty of fair representation - Board dismissing complaint - Union abandonment of casual representation rights occurring before employment of complainants - Complainants not employees in bargaining unit which union continued to be entitled to represent - Abandonment of part of bargaining unit not *per se* breach of fair representation duty where not arbitrary, discriminatory, or in bad faith - Union estopped from asserting representation rights in any case
- STOTHERS, TED AND BRUCE SKREPTAK; RE B.B.F, LOCAL 128; RE HYDRA-DYNE INDUSTRIAL CLEANING SERVICES LTD..... 347
- Unfair Labour Practice - Certification Where Act Contravened - Interference in Trade Union - Intimidation and Coercion - Employer firing four union supporters and failing to retain another union supporter for training of replacement - Events occurring shortly after start of organizing campaign - Employees so intimidated by employer conduct that usual remedies unlikely to be effect - Vote unlikely to reveal true wishes - Union filing cards for approxi-

mately 25% of bargaining unit - Employer actions severe and at start of campaign - Substantial additional union support likely but for employer actions - Union having adequate support for collective bargaining - Certificate issuing	
NEPEAN BUS LINES INC.; RE TEAMSTERS' UNION, LOCAL 91; RE DAVE LONEY	295
Unfair Labour Practice - Practice and Procedure - Collective Agreement - Duty of Fair Representation - Employee objecting to early termination of collective agreement - Employee arguing Board should not decide early termination application until his fair representation complaint had been dealt with - Employee objecting to union handling of vote on employer's last offer - Employer threatening to shut down all three plants if concession package not agreed to for all locations - Union totalling votes from all 3 locations and agreeing to accept package - Union making honest "hard choice" - Union not obliged to take vote on acceptance of employer offer or to follow employee wishes - Union affirming early termination - Fair representation complaint not concerned with "open period" and not seeking matter relevant to Board's discretion - Fair representation complaint need not be heard first - Complaint dismissed - Early termination decision affirmed	
STELCO FASTENER & FORGING CO., STELCO INC.; RE U.S.W.A., LOCAL 3767 AND 3749; RE FRED J. ZICARD	339
Unfair Labour Practice - Collective Agreement - Union complaining of employer failure to accept insertion of statutory arbitration provision into agreement - Necessary threshold determination whether agreement was collective agreement to which Act applies - Elements of estoppel established - Public interest not requiring that agreement between employer and union be treated as collective agreement under Act if parties agree otherwise - Unfair to permit retroactive characterization of agreement such that employer would have refused to sign it had characterization been applied at the time - Union estopped from asserting agreement one covered by Act	
ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE THE COALITION TO STOP THE CERTIFICATION OF THE SOCIETY, ON BEHALF OF CERTAIN EMPLOYEES	305
Unfair Labour Practice - Duty of Fair Representation - Employer reorganizing work - Reorganization leaving complainant performing work within two different bargaining units - Union representing both units - Union not challenging reorganization and seeking flexibility over work - Union entitled to assess competing interests of bargaining unit members in light of collective agreement - Complaint dismissed	
GATES, FRANK; RE H. J. HEINZ COMPANY OF CANADA LTD., U.F.C.W., LOCAL 459	258
Union Security - Complainant challenging reasonableness of \$12,000 fine assessed by union for mismanagement of union funds while treasurer - \$120,000 missing or unaccounted for during complainant's term of office - Complainant unsuccessfully appealed fine through internal union process - Board dismissing complaint - Board having authority to review internal union process for purpose of determining reasonableness of fine - Process arising from legitimate union concern - Complainant having fair opportunity to hear case against him and defend against charges - No evidence process was malicious attempt to deprive complainant of union membership - Amount of fine not out of proportion under circumstances - Assessment not unreasonable	
CONNELL, DAVID; RE KRUGER INC. AND C.P.U.	230

1930-89-R International Ladies' Garment Workers Union and Ontario Cloakmakers, Dress and Sportswear District Council of the International Ladies' Garment Workers Union, Applicants v. Briston Fashions Inc. and Jay Garment Manufacturing Co., Ltd., Respondents

Related Employer - Sale of a Business - Fashion tailoring business transferred as functional entity - Original employer continuing to exist as contracting company - Sale of business declaration issuing

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members R. W. Pirrie and C. McDonald.

APPEARANCES: L. Steinberg, H. Mohabir and H. Stewart for the applicant; Mathew Chung for the respondent, Jay Garment Manufacturing Co. Ltd.

DECISION OF THE BOARD; March 20, 1990

1. This is an application for a declaration under section 63 of the *Labour Relations Act* that a sale of business has taken place from Jay Garment Manufacturing ("Jay Garment") to Briston Fashions ("Briston"). In the alternative the applicants seek relief under section 1(4) of the Act.
2. Joseph Bartha, the principal of Jay Garment, set up business around 1949 as a coat manufacturer, making ready-made garments. At that time, custom tailoring was not as profitable a business. He continued manufacturing coats until approximately ten or fifteen years ago, when he gave up manufacturing and went back to the custom tailoring trade he had learned in the military in the thirties. Jay Garment was his corporate name, but he had a registered style from 1985 on, Briston Fashions. He first entered into a collective agreement with the applicant trade union in the early 1960's, when he was located on Adelaide Street. About eight years ago, the operation moved, unchanged, to Spadina Avenue.
3. In the Spadina location there was a sign out front which said "Briston Fashions". People would come in and were able to buy ready-made suits and coats. Samples for custom-made suits were also available. Fabrics would be shown, and measurements taken. If this was the choice of the customer, Mr. Bartha would have the garment made up in the back room where there were cutters and people sewing, employed by Jay Garments. The labels in the finished garments said "made for Briston by Jay". As far as the public was concerned it was dealing with Briston.
4. Mr. Bartha had discussions in late 1988 and 1989 with Mr. Chung about the possibility of selling the business. Mr. Bartha testified that Mr. Chung wanted to go into an import business, having samples from Hong-Kong. Mr. Chung had no experience in designing or making of coats prior to this venture. As a result of these discussions Mr. Chung took over Jay's leased premises in January, 1989. He bought all of the assets of Jay Garment, which included everything necessary to make suits and garments (sewing machines and fabrics), as well as finished goods (ladies coats, suits and skirts), the Briston name and the expertise of Mr. Bartha.
5. The trade name "Briston Fashions" was withdrawn by Jay Garment on February 14, 1989 and Mr. Bartha promised not to use it again. Mr. Chung was interested in using the name, since it had been around for approximately twenty years. Mr. Chung subsequently registered the name "Briston Fashions Inc." himself. He acknowledges that the name helped him. Mr. Chung was issued a new vendor's permit on February 17, 1989 in the name of Briston Fashions. In

August, he incorporated a company called Briston Fashions Inc. However, he said he was not interested in obtaining the customer lists from Briston.

6. Mr. Bartha now considers himself self-employed and has maintained the corporate vehicle of Jay Garments. His only client is Mr. Chung, from whom he receives four hundred dollars a week. He spends his time designing, making patterns and cutting.

7. All Mr. Bartha's employees were laid off initially by Mr. Chung, but in March a tailor and machine operator were called back and in May, another sewing machine operator was called back.

8. According to Mr. Bartha, the main difference between the two operations is that there are more "try-ons" or fittings in the new operation. He agreed that both operations were doing custom tailoring. He agreed with counsel's characterization that he had been a custom tailor and now he was a fancier custom tailor. The fact that the garments are produced in the back and sold in the front of the premises has not changed. The Briston sign remains in the public area. One of the sewing machine operators who had been called back, and who had worked for Jay Garment for fifteen years, testified that there was no difference in the operations from his point of view. He still spends most of his time on the sewing machine; Mr. Chung's customers are perhaps somewhat fussier.

9. Mr. Chung argued that because Mr. Bartha was a coat manufacturer when he initially entered into the collective agreement with the applicant that Mr. Chung's new custom tailoring operation could not be a successor to Mr. Bartha and could not be bound by the collective agreement. Mr. Chung feels that the collective agreement has no bearing on the custom tailoring industry but was designed for a cloak manufacturer. As a small custom tailor he does not think he should be found to be a successor.

10. Union counsel relies on *Shiffer-Hillman Clothes*, [1983] OLRB Rep. May 764. He characterizes it as a similar case which was not as clear as the facts before us. In that case, the Board found a sale of part of a business where the successor was carrying on a restructured business based upon a part of the earlier business. It found that the most important components in a clothing business were the location and the name. The Board found that the fact the respondent had varied the manner of merchandising and reaching the ultimate purchasers by contracting out the manufacturing and selling directly to the public, rather than manufacturing and selling wholesale as the vendor had, did not change the fact that the respondent was now operating part of the business formerly operated by the vendor. The Board in that case spoke of the purpose of section 63 - to give some permanence to collective bargaining rights so that they would not evaporate with a change of employer. The Board said as follows at paragraphs 14 and 15:

14. As the Board observed in *Marvel Jewellery Limited and Danbury Sales (1971) Ltd.*, [1975] OLRB Rep. Sept. 733, section 63 recognizes that collective bargaining rights should have some permanence and that rights created either by the Act or under a collective agreement are not allowed to evaporate with a change of employer. In the instant application, the respondent presently employs six employees (including three employees in the bargaining unit represented by the applicant in collective bargaining with Shiffer) who were formerly employed by Shiffer. However, the employment of former employees is merely one factor which may accompany the sale of a business.

15. The Board, in determining whether a sale of a business has occurred, has examined the totality of the transaction and has not had regard merely to the outward form of the transaction. In *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691, the Board at page 698 listed some considerations in determining whether a sale of a business has occurred and stated:

En route to a determination of the above essential questions the cases offer a countless variety of factors which might assist the Board in its analysis: among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e. whether there has been a continuation of the business.

11. We have no hesitation in finding that on the considerations in these and other cases in the Board's jurisprudence, that there was a sale of business from Jay Garments to Briston. The business was transferred to Mr. Chung as a functional entity. Although it was Mr. Chung's evidence that he had no intention to buy the business, it is clear that he has in fact continued to carry on the business that was being operated by Mr. Bartha, only slightly restructured. Jay Garment exists in name only as a contracting company to Briston Fashions. Briston retains its services to do design and other work. Mr. Chung produces the same product for essentially the same market. If one asks what happened to the business of Jay Garments in January, 1989, it is clear that it was transferred, with minor changes, to Mr. Chung, who now carries it on as Briston Fashions in the same place, with some of the same personnel, after only a brief hiatus in operations. The agreements respecting the Briston name, the continuity of the location and means of production with former Jay Garment employees and the continuing involvement of Mr. Bartha are particularly persuasive factors.

12. Mr. Chung appeared to feel very strongly that it was not appropriate for a custom tailor to be bound by a cloak manufacturer's collective agreement. Section 63 does not operate on the basis of what kind of collective agreement is in place, or what the business was at the time of the original contract. Rather, the collective agreement or the bargaining relationship attaches to the business at the time of the sale, however it may have changed from the time the first collective agreement was entered into.

13. Given our finding that a sale of business has occurred, it is not necessary to consider the alternate request under section 1(4). In the result, Briston is bound by the current collective agreement between The Toronto Cloak Manufacturers' Association and the applicant union.

2638-89-R Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, Applicant v. **Bruce W. Smith Building Materials Ltd.**, Respondent v. Group of Employee, Objector

Bargaining Unit - Certification - Practice and Procedure - Employer challenging inclusion of certain employees in bargaining unit on basis of community of interest - Employer requesting matter be heard by panel without exchange of pleadings - Hearings by panel liable to be inefficient use of resources where factual issues have not been narrowed by an officer inquiry or exchange of pleadings - Board directing inquiry by Labour Relations Officer

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *J. A. Rundle* and *B. L. Armstrong*.

APPEARANCES: *Linda Huebscher* and *Don Swait* for the applicant; *Fred Heerema*, *Bruce Smith* and *Robert G. Richter* for the respondent; no one appearing for the objector.

DECISION OF THE BOARD; March 7, 1990

1. The title of this proceeding is amended to describe the respondent as: "Bruce W. Smith Building Materials Ltd."
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of clause 1(1)(p) of the *Labour Relations Act* ("the Act").
4. Except for the emphasized words, the parties agree that the following describes the appropriate bargaining unit in this application:

all employees of the respondent in the City of St. Thomas, save and except foremen, persons above the rank of foreman, office, clerical *and sales staff*, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

The applicant takes the position that "sales staff" should be excluded, so that the employees in the unit would be those engaged in yard work and truck driving. The respondent takes the position that "sales staff" should be included with yard workers and truck drivers in a single unit from which office, clerical and part-time employees and students employed during the school vacation period would be excluded.

5. The union says that the sales staff have a stronger community of interest with the excluded office and clerical workers than they do with the included yard workers and drivers. The respondent takes the position that a unit consisting of only yard workers and drivers is not a viable unit for collective bargaining and that the sales staff share a community of interest with the yard workers and drivers.
6. The respondent filed a list of the persons whom it says fall within the bargaining unit it describes as appropriate. The report of the Labour Relations Officer on that meeting contains these notations with respect to the applicant's challenges to the list:

The Applicant challenges twelve employees on the list for the Count (See Appendix "B") on the basis of Community of Interest.

In addition, AUSTIN WARD (A 18) is also challenged on the basis that he is a part-time employee.

It is the Respondents position that all twenty employees at [sic] Appendix "B" should be members of the bargaining unit and that AUSTIN WARD (A 18) is a full-time employee.

When the parties came before us in the afternoon, we asked whether the twelve individuals referred to were challenged solely because they were "sales staff". The applicant's representative said that that was the sole basis of challenge with respect to nine of the twelve. As for three of the cashiers, Debbie McKnight, Michelle Panter and Tonya Silverthorn, the applicant says they spend part of their time working in the office as office employees and, so, may not be full-time even in the bargaining unit proposed by the respondent. The applicant's representative also said it did not know whether Austin Ward, the thirteenth individual challenged, was engaged in a sales function or an office function.

7. Counsel for the respondent took issue with what he characterized as enlargement by the applicant of the grounds of challenge which had been asserted by the applicant during the meeting with the Labour Relations Officer. Despite counsel's submissions in that regard, it appeared to us that the vague phrase "on the basis of Community of Interest" used in the report was certainly capable of describing a challenge based on an individual's being in a category (office and clerical) which the parties had agreed should be excluded when, as respondent's counsel conceded, the only rational basis for such an exclusion would be "community of interest". Moreover, the nature of the work performed in the office by the three cashiers in question would be something the Board would have to hear about in any event in assessing whether their community of interest lay more with the office workers than with the yard workers; counsel for the respondent was unable to identify any prejudice it would suffer if the applicant were permitted to pursue the assertions first made before us.

8. The applicant and respondent could not agree on the process the Board should adopt in order to resolve their disagreement about the composition of the appropriate bargaining unit. The applicant's position was that the Board should appoint a Labour Relations Officer to enquire into and report to the Board on this issue. The respondent took the position that the issue should be dealt with directly by a panel, commencing that afternoon.

9. The applicant's representative said it did not have enough information about the individuals and positions in dispute to address the dispute in evidence right away. Bearing in mind the way the dispute developed we did not think the trade union could be faulted for this. That is particularly so when, as the applicant would have been aware, the Board's usual reaction to a community of interest issue is to appoint a Labour Relations Officer to inquire into and report on it.

10. Hearing time before panels is most productively used when both parties understand what the dispute is about. From the perspective of the panel which must ultimately resolve a bargaining unit composition issue, it is desirable that disputes about the relevant underlying facts be narrowed or resolved. Experience teaches that in these cases such factual disputes will often be narrowed or even resolved before hearing if the trade union party has had an opportunity to hear and investigate in detail the employer's assertions about the nature of its operations and the duties and responsibilities of those in the relevant job categories. The officer inquiry process affords that opportunity. That is one of the reasons for using it. There have been circumstances in which panels have dealt with community of interest issues by hearing the parties' evidence directly, as in the *Toronto General Hospital*, [1986] OLRB Rep. Jan. 176 and [1986] OLRB Rep. April 566. In that case, the Board directed that the parties exchange "pleadings and productions" with respect to the issue in dispute before the matter came on for hearing before a panel. That exercise can also result

in narrowing or elimination of factual disputes (as it did in *Toronto General Hospital, supra*) and at very least promotes the sort of advance preparation for hearing which expedites the hearing itself. Unless preceded by an officer inquiry or some exchange of pleadings and productions to narrow the issues and both encourage and permit preparation for hearing, a formal hearing before a panel is liable to prove an inefficient use of the resources of all concerned.

11. Counsel for the respondent took the position that there should not be an exchange of pleadings and productions, as the matter was one which he felt could be elaborated by hearing the three or four witnesses he proposed to call, together with whatever witnesses the union might call. He referred to the Board's decision in *Canadian Corporate Management Limited*, Board File 0436-88-R (decision dated August 3, 1988, unreported), in which a similar issue was resolved in an oral ruling after a panel of the Board had heard three witnesses. A review of the Board's file in that matter discloses that on the first scheduled hearing date, the applicant and respondent agreed that the matter be adjourned for hearing on two consecutive days approximately six weeks hence. It is not apparent from the file what might have been discussed by the parties in coming to that agreement. We may infer that neither they nor the panel which accepted their agreement thought that an exchange of pleadings and productions was necessary.

12. In all the circumstances of this case, we are not persuaded that the outstanding issues in this matter should be put before a panel "cold", without benefit either of an officer's inquiry and report or an exchange of pleadings and productions. Accordingly, we direct that a Labour Relations Officer to be named by the Board's Manager of Field Services inquire into and report to the Board on:

(a) the community of interest, if any, between persons employed by the respondent as sales persons and cashiers and

(i) those employed by the respondent as drivers or in its yard, on the one hand,

and

(ii) those employed by the respondent in categories which the parties agree are excluded from the appropriate bargaining unit in this application, on the otherhand,

as of the application date;

and,

(b) the nature of the work performed by Debbie McKnight, Michelle Panter, Tonya Silverthorn and Austin Ward as of the application date.

0758-89-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. 799316 Ontario Inc. c.o.b. as **Concrete Systems**, Respondent

Bargaining Unit - Certification - Construction Industry - Practice and Procedure - Reconsideration - Applicant requesting variation of clarity note in earlier certification decision - Clarity note not part of unit description - Certificate issued subject to terms of Board decision, including any clarity note - Reconsideration denied

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *W. Gibson* and *C. A. Ballentine*.

DECISION OF THE BOARD; March 13, 1990

1. The Board issued a decision dated July 18, 1989 certifying the applicant as the exclusive bargaining agent for all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman. Two certificates were issued to the applicant pursuant to section 144(2) of the *Labour Relations Act*, one for construction labourers employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and another in respect of all construction labourers employed by the respondent in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector.

2. The Board's decision contains a declaration that, for purposes of clarity, employees of the respondent engaged in cement finishing work are included in the bargaining unit which the Board found to be appropriate for collective bargaining purposes. That clarity note does not form part of either certificate issued to the applicant. The applicant has asked the Board to reconsider its decision pursuant to its discretion under subsection 106(1) of the Act and, to the extent necessary, vary the two certificates so that each includes the clarity note.

3. A clarity note is a device used by the Board at its discretion in circumstances where the Board believes it will assist the parties to avoid or resolve conflicts about whether particular employees are included in or excluded from the unit. A clarity note is not part of the description of the unit and does not in any way alter or affect the description of the unit. To put it another way, the clarity note speaks to whether particular employees of the respondent are employed at jobs which fall within the scope of the bargaining unit description.

4. Each certificate issued to the applicant contains the following statement:

This certificate is to be read subject to the terms of the Board's decision(s) in this matter and, accordingly, the bargaining unit described herein is to be read subject to any qualifications referred to in the said decision(s) of the Board.

In the Board's view, this paragraph makes it clear that either certificate must be read subject to, amongst other things, the clarity note in the decision which gave rise to the certificates being issued to the applicant. Therefore, no useful purpose would be served by amending the certificates to include the clarity note. Accordingly, the Board declines to reconsider and vary its decision which issued July 18, 1989.

1688-89-U David Connell, Complainant v. Kruger Inc. and Canadian Paperworkers Union, Respondent

Union Security - Complainant challenging reasonableness of \$12,000 fine assessed by union for mismanagement of union funds while treasurer - \$120,000 missing or unaccounted for during complainant's term of office - Complainant unsuccessfully appealed fine through internal union process - Board dismissing complaint - Board having authority to review internal union process for purpose of determining reasonableness of fine - Process arising from legitimate union concern - Complainant having fair opportunity to hear case against him and defend against charges - No evidence process was malicious attempt to deprive complainant of union membership - Amount of fine not out of proportion under circumstances - Assessment not unreasonable

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *R. M. Sloan* and *K. Davies*.

APPEARANCES: *David Connell* on his own behalf; *Thomas A. Stefanik*, *Barrie Goodman*, *Howard Brennan* and *Victoria L. Seipp* for Kruger Inc.; *N. L. Jesin*, *Andre Foucault* and *Joe Oleira* for Canadian Paperworkers Union.

DECISION OF THE BOARD; March 9, 1990

I

1. The complainant was employed by the respondent employer for a number of years. On July 26, 1989, his employment was terminated. It is common ground that the only reason for the termination was that the complainant had been expelled from membership in the trade union.

2. The relevant collective agreement contains a maintenance of membership provision requiring employees in the bargaining unit to maintain membership in good standing in the union as a condition of employment. Following a series of events hereinafter described, the union expelled the complainant from membership for refusing to pay a fine levied against him in the amount of \$12,000.00.

3. The complainant seeks to rely on sub-section 46(1)(a) and sub-section 46(2)(a)(g) of the *Labour Relations Act* (the "Act") which provide as follows:

46.-(1) Notwithstanding anything in this Act, but subject to subsection (4), the parties to a collective agreement may include in it provisions,

- (a) for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;

...

(2) No trade union that is a party to a collective agreement containing a provision mentioned in clause (1)(a) shall require the employer to discharge an employee because:

- (a) he has been expelled or suspended from membership in the trade union; or

...

for the reason that the employee,

...

- (g) has refused to pay initiation fees, dues or other assessments to the trade union which are unreasonable.

4. At the outset of the hearing it was the position of the respondent employer that it could not be found to have violated subsection 46(2) of the Act. It requested that the panel dismiss the complaint against it. The panel advised the parties that although it was of the view that the employer could not be found to have violated subsection 46(2) (in that the prohibition in that section is directed against actions of a trade union), it appeared to us that this proceeding is analogous to proceedings under section 68 of the Act. The panel was not prepared to say at that stage of the proceeding that there could be no remedy imposed in any circumstances that would not affect the employer. The employer chose to remain and participate in the proceeding.

II

5. Many of the facts leading up to this complaint are not in dispute. The complainant was a member of the Canadian Paperworkers Union Local 1646 ("the union") which represented employees at Kruger Inc. In 1981, the complainant was elected treasurer of the union. At the same time, a Mr. J. Joudrey was elected president.

6. There is no dispute that the duties of union treasurer, pursuant to its constitution, include the responsibility for maintaining financial records with respect to the union's funds and any monies received from the parent union earmarked as strike funds. The union treasurer is the person who receives all the monies, deposits them in the name of the union and countersigns all cheques. It is understood that the treasurer is expected to keep accurate records of money received and dispersed and, as the complainant agreed in cross-examination, it was the treasurer's job to ensure that the union's money "didn't get lost, stolen or go missing".

7. In October 1982 the union went on strike against Kruger Inc. That strike lasted for sixteen weeks. During that time the union received over \$141,000.00 specifically for its strike fund.

8. In 1983 Mr. Vince Aguis, another member of the union, was elected trustee. Under the union's constitution a trustee is responsible for conducting a quarterly review of the union's financial records. It is the trustee's responsibility to report directly to the union membership. Upon being elected, Mr. Aguis undertook to fulfill that responsibility. He approached Mr. Connell in order to obtain the records. Mr. Connell refused to turn over any information to Mr. Aguis on the basis that the local president, Mr. Joudrey, had told him not to. Mr. Aguis then sought the assistance of the parent union in order to force Mr. Connell to allow him the opportunity to review the financial records.

9. There was some evidence of a meeting around this time with a Mr. Larouche who, Mr. Connell asserted, was a trustee of the union at the time. Mr. Connell also asserted that Mr. Larouche found no discrepancies in the financial records. It seems to the panel however that Mr. Larouche was not an elected trustee of the union but was someone apparently "appointed" by Mr. Joudrey at that time.

10. With the intervention and assistance from representatives of the parent union, Mr. Aguis did receive the financial records in approximately February 1984. As a result of his review he developed substantial concern with respect to a number of expenditures unaccounted for and certain entries which appeared to him to be suspicious. The records were not in such order that they could properly be reviewed or audited. In the result, pursuant to a motion passed at a union mem-

bership meeting, an independent professional auditor from Deloitte Haskins, a firm of chartered accountants, was retained to review the union's financial records.

11. The result of these various investigations into the financial state of the local union revealed that approximately \$86,000.00 of the monies attributable to the strike fund were missing and unaccounted for. In addition, approximately \$36,000.00 of the union's funds had also been paid out but were not accounted for.

12. Following this investigation charges were brought against five members of the then union executive. Subsequently, the union proceeded with charges against three executive members, Mr. Joudrey, the president, Mr. Connell, the treasurer, and a Mr. Sciceluna.

13. Each of the three individuals were found guilty of charges of misappropriation and/or mismanagement of union funds in violation of the union constitution. Mr. Joudrey was fined \$15,000.00. He did not appeal. He subsequently became ill and has since died. Mr. Sciceluna was fined \$2,000.00. He appealed and the findings against him were overturned on the basis that there was insufficient evidence with respect to his involvement.

14. It is the decision of the union to fine Mr. Connell \$12,000.00 that is the subject matter of this complaint. Mr. Connell was charged with the misappropriation and/or mismanagement of union funds in violation of the union constitution. As a result of those charges Mr. Connell went before a tribunal committee of the union. It heard evidence and concluded that he was guilty of the charges. It recommended to the membership of the union that Mr. Connell be fined \$12,000.00 to be paid over a period of 72 months, in addition to his being suspended from running for any position of the executive for 25 years.

15. Prior to proceeding to the membership, the union executive (by now having been replaced) met with the complainant in order to see if matters could be resolved. Mr. Connell was at this time represented by counsel. An agreement was reached which provided as follows:

Between:

Philip Henry and all the Executive Members of the Canadian Paperworkers Union,
Local 1646 on behalf of themselves and all the members of the Canadian Paperworkers Union, Local 1646 (hereinafter - Local 1646)

and

David Connell

Whereas David Connell was at all material times a member of Local 1646 and was bound by its constitution and By-Laws,

AND WHEREAS David Connell was elected Treasurer of Local 1646 in or about September, 1981 and was removed from the position of Treasurer in or about July 1984.

The parties hereby agree as follows:

1) David Connell did not perform his duties in the position of Treasurer in a responsible and satisfactory manner in that a significant amount of unaccounted expenditures from Local 1646's Treasury were allowed to be made during his term of office.

2) David Connell agrees to pay to Local 1646 \$6,000, as compensation for some of the unaccounted for expenditures. Payment will be made at a rate of \$100.00 per week with interest of 12% per annum to be made on the unpaid balance.

3) David Connell agrees to provide affidavits fully disclosing his knowledge of any and all unaccounted for expenditures from Local 1646's treasury. Such affidavits must be satisfactory to Local 1646 or its counsel and must be delivered to its counsel on or before April 5, 1985.

4) The President and Vice-President of Local 1646 agree that they will recommend to the membership that David Connell remain a member of Local 1646.

5) The President and Vice President of Local 1646 agree to recommend that the membership of Local 1646 approve this agreement, such approval being a condition precedent of this agreement.

Dated at Toronto this 28th day of March, 1985

"David Connell"

David Connell

"Norman Sedore"

for Local 1646

16. A meeting was arranged in order for Mr. Connell to disclose any information with respect to the missing funds. Mr. Connell, having received notice of that meeting, refused to attend. He testified that he refused to comply with the agreement because he was concerned that the union's bonding company might seek to recover monies from him.

17. Following the complainant's repudiation of the agreement, the union membership refused to ratify it as well. Consequently the charges as they had originally proceeded before the tribunal committee went before the union membership. Although the evidence is a little unclear, it would appear that Mr. Connell did not have anyone present representing him before the membership although he was present and heard the evidence against him. The conclusion of the membership was to accept the recommendation of the tribunal committee for a fine in the amount of \$12,000.00. They amended the period of payment from the recommended 72 months to 36 months. Mr. Connell was advised that a failure to comply with the membership's decision would result in his expulsion from membership.

18. The complainant appealed the conclusions of the tribunal committee and the acceptance of its recommendation by the membership. A Mr. Dunberry was designated by the parent union's national president to hear the appeal. He conducted what was in effect a trial *de novo*. That hearing convened on November 17, 1986. Mr. Connell appeared and was represented by counsel. Mr. Aguis presented evidence on behalf of the union. At the end of the day, counsel for Mr. Connell requested an adjournment in order to prepare. That adjournment was granted and Mr. Aguis provided counsel with copies of the documentation that had been referred to during the course of the day.

19. Notice was provided to reconvene on July 2, 1987. Mr. Connell's counsel appeared and made a request for a further adjournment. That request was denied by Mr. Dunberry. Counsel chose not to call any evidence on behalf of Mr. Connell. Mr. Connell was not present. There is no evidence to suggest anything except that Mr. Connell simply chose not to attend. Mr. Dunberry subsequently issued a decision on October 8, 1987 finding Mr. Connell guilty of financial mismanagement and wrongful taking of union monies in violation of the union constitution.

20. The decision of Mr. Dunberry provides as follows:

Decision of the CPU National President's

Designee in the Appeal of David Connell

1. David Connell has appealed a finding by a Committee of Local 1646 that, when acting as Treasurer of the Local, he was guilty, during the years 1982 to 1984, of financial

mismanagement and the wrongful taking of monies, contrary to Article XIX, section 2 (e) and (I) of the CPU Constitution.

2. The charges against David Connell, as forwarded to him by registered letter in July 1984, stated that while serving as an officer of Local 1646 in the office of Treasurer, he was guilty of:
 - a) financial mismanagement or malpractice or corrupt practices in relation to money and financial records and;
 - b) the wrongful taking or retaining of monies, books, papers or other property belonging to the National Union or the Local Union and the wrongful destruction, mutilation, or erasure of books, bills, receipts, vouchers, or other property of the National Union or the Local Union,

contrary to Article XIX, Section 2 (e) and (i) of the Constitution, in that during the period of your Office, acting alone or in combination with others, you received and otherwise dealt with certain funds of the National Union or the Local Union with which you were entrusted and negligently failed to keep an accurate record of all money received; that you failed to keep a complete record of bills and other payments; that you altered or acquiesced in the alteration of financial records, documents or other paper related to such funds; that, without limiting the gravity of any of the above, between September 19, 1982 and December 21, 1982, you dealt with monies intended for or purportedly intended for strike pay and failed to give a proper accounting or explanation for the expenditure of such monies; that as a result of all of the above, not less than \$36,244.89 was paid out in unidentified payments during the years 1981 to 1983; and further, that during your term of office you have permitted unwarranted or excessive expenditures of Local Union funds for the remuneration of Local officers and for Executive meetings.

3. Before this Tribunal, evidence was presented against David Connell at a hearing held on November 17, 1986. The hearing was then adjourned to give David Connell and his counsel time to prepare their case. However, on July 2, 1987, when the hearing resumed, counsel for David Connell, after a further adjournment was denied, chose not to proceed. In effect, no evidence was presented by David Connell, and David Connell himself did not testify on his own behalf.
4. The duties of the Local Union Treasurer are important, and are spelled out in the Union's Constitution. Under Article XI, section 10, the Local Union Treasurer is required to receive all monies, deposit same in the name of the Local Union in a bank account, and countersign cheques. The Treasurer is expected to keep accurate records of monies received and paid out in order to be able to give an account at all times of money in his keeping.
5. Moreover, under the Union's Strike Policy Handbook, monies from the Union's Defence Fund are to go to pay strike relief, and nothing else. After two weeks on strike, a cheque is mailed each week to the Local Union for an amount equal to \$40 multiplied by the number of members on strike. The Local is to send the National office a list of members, and keep a roster of benefit payments signed by individual members. The Local must set up a special chequing account for the receipt and disbursement of strike relief. Strike relief benefits, which are to be paid by cheque or cash, are to be approved by a Local Welfare Committee. Following termination of the strike any remaining Defence Fund monies are to be returned with a copy of the audit to the National Office.
6. David Connell was Treasurer of Local 1646 at all material times. During David Connell's tenure as Treasurer, the Local was on strike against Kruger Inc. The strike lasted for 16 weeks from October 1982 to January 1983.
7. During this period, especially, David Connell failed totally to fulfil his responsibilities as Treasurer of Local 1646. Thus, he kept only one account to which all deposits were

made and from which all cheques were issued. The records do not indicate that any special strike fund account was ever set up, or that any Local Welfare Committee was ever established, or that rosters of members in receipt of benefits were properly maintained. There is no evidence that picket duty was ever recorded. Monies were disbursed to employees who were already on weekly indemnity or had terminated their employment. Large amounts of money were disbursed without obtaining signatures from members acknowledging what they were paid, or if they were paid at all. No audit was ever provided to the National Office. No funds were ever returned at the end of the strike. Substantial sums are simply unaccounted for. In short, the Strike Policy Handbook was ignored.

8. The evidence, presented in documented detail, establishes that the Local Union received over \$141,000, including \$122,880 from the National Defence Fund and \$15,360 from a special strike fund. However, the evidence indicates that, apart from the sum of approximately \$12,000 paid by cheque for OHIP and other legitimate strike expenses, only \$43,965 was actually paid out *by cheque* to individual members for strike relief.
9. In fact, cancelled cheques show that the Treasurer David Connell and the President James Joudrey made out cheques to "cash" (in effect, payable to the bearer) and themselves cashed the cheques, for a total of \$73,450. What happened to this money? According to the Strike Policy Handbook, payments could be made to members in cash, but if this occurred, one would expect to see a register signed by members acknowledging receipt of payment. Only one register is available, for the week ending December 9, 1982.
10. Even assuming that every one of the 187 members on strike picketed, and payments were made in cash and not recorded, the maximum amount that should have been paid out to individual members would be \$101,200. Taking into account the \$12,000 spent for legitimate strike expenses, the sum of \$28,000 should still have remained from the monies received by the Local which were in excess of \$141,000. Yet no money was ever returned to the National.
11. The evidence is strong, clear and unchallenged. Over \$141,000 was received as strike funds. A sum of \$43,965 was paid by cheque to individual members, and \$12,000 was paid for strike necessities. The balance is approximately \$85,000. For the proper deposit and disbursement of this money the Treasurer is responsible. Yet, as indicated above, the sum of \$73,450 was paid out and cashed by Connell and Joudrey themselves. There is no evidence, and Connell has offered none, to counteract the inference that Connell and Joudrey retained all or part of the monies.
12. The balance of the \$85,000 was apparently paid by cheque, again by Connell and Joudrey, for various purposes, including Visa charges, none of them evidently relating to the strike. Additional cheques for \$20,000 were issued before and after the strike by Connell and Joudrey for purposes also unrelated to Local business. Again, no explanation at all has been provided by Connell to support the propriety of these payments.
13. As Treasurer Connell was required to report to the membership on disbursement of Local monies. This he failed to do. He did not keep accurate records of monies received and paid out, and indeed signed cheques for large amounts of money which he himself then cashed. There is no evidence that such monies were ever spent for legitimate union purposes, nor were they ever returned to the union.
14. In conclusion, the findings of the Local Committee that the Constitution has been violated are correct. I find that David Connell is indeed guilty of financial mismanage-

ment and wrongful taking of union monies. Therefore, the appeal is dismissed and the penalty confirmed.

October 8, 1987

Fernand Dunberry
National President's Designee

21. Mr. Connell appealed Mr. Dunberry's decision to the union's National Convention. This is the last stage of the appeal process provided for in the constitution. A date was set for that appeal but it appears that it was adjourned at the request of the complainant. A further date was set for July 30, 1988. Although Mr. Connell received notice of that date he did not appear. The convention proceeded in his absence and confirmed the findings made by Mr. Dunberry. The complainant testified before the Board that he was out of the country at the time of this appeal. However there is no evidence that he made any attempt to advise the union that he would not be able to attend.

22. The final communication to the complainant from the union was a registered letter dated December 14, 1988. It advised Mr. Connell that he had exhausted all his appeal procedures and requested that he make full payment of the \$12,000.00 amount by January 27, 1989. He was also advised that failure to comply with that request would result in his expulsion from membership. No payment was made and the complainant was expelled. The company was so advised and as indicated earlier, his employment was terminated on July 26, 1989 pursuant to the maintenance of membership provision in the collective agreement.

23. It is clear to the panel that Mr. Connell neither had nor has any intention of paying the union any amount for any fine in connection with these charges. He repudiated the signed agreement of March 1985 on the advice of a second lawyer. This action and his continuing refusal to pay any amount derives solely and expressly from his concern that the bonding company may seek to recover from him personally. The union held a bond which insured it from, essentially, acts of fraud or dishonesty on the part of its staff or officers. The bond did not protect against acts of incompetence, mismanagement or negligence. Mr. Connell was not aware of the coverage provided by the bond until the hearing into this complaint. The bonding company paid the union \$15,000.00 in respect of its losses.

24. Mr. Connell did admit that while he was treasurer the money referred to (totalling some \$120,000.00) went missing and unaccounted for. He admitted to the mismanagement of the union's funds but denied that he stole any money.

25. He testified that he wasn't taught how to perform the treasurer's job properly. The parent union does provide training programs for local treasurers. Mr. Connell did not make use of these courses. The reasons for that are not clear.

26. He acknowledged that he would have been able to meet the terms of the repayment plan set out in the original agreement. When asked by counsel in cross-examination to assume the union's view of his actions he conceded that a fine of \$12,000.00 was a reasonable amount.

27. Mr. Connell was unrepresented and his evidence in chief was brief. He asserted that an employer should not and does not have to listen to a union in a case like his. It was a matter between the union and the employee. He stated that the union accused him of taking money which he denied. He went on to say that, "it went through all the stages. I shouldn't have been fired because I didn't take any of the union's money." When asked by the panel if there was any other way in which he felt the fine was unreasonable the complainant answered no.

28. Following his termination on July 26, 1989, the complainant obtained a new job on August 15, 1989 at a higher wage rate than his position with Kruger Inc. By way of remedy the complainant requests severance pay in the amount of two weeks for each year of service (fourteen years). He asserts that because "the union and company worked together" the company is responsible for severance pay. He also seeks an amount equal to his lost wages for the period of time until he obtained his new position (approximately 3 weeks). He does not seek reinstatement to his position at Kruger Inc.

III

29. It is the complainant's position that the fine assessed against him is unreasonable because he challenges the conclusions of the union's trial and appeal levels. His position was summed up in his statement, "why should I pay for something I didn't take?" He also submitted that it was his belief that the union should not be able to tell the employer who it can fire.

30. The union's position is that in the circumstances the fine is entirely reasonable. The complainant was entrusted with serious responsibilities as treasurer and was found to have failed completely in those responsibilities. The union is particularly of this view given that much of the missing money was supposed to have provided support for members out of work on a long strike. The union argues that it made every effort to be flexible by meeting with the complainant to work out a mutually acceptable arrangement.

31. It further argues that this Board should not attempt to determine the complainant's guilt or innocence of the charges. The union's constitution provides the proper forum for that issue. If the complainant seeks to challenge the fairness of that process, that is properly an issue for the courts, not this Board. The union would dispute that there were any deficiencies in the process conducted pursuant to the constitution. It points to the evidence that the complainant took advantage of all levels of appeal, had the benefit of counsel, and was granted adjournments in appropriate circumstances. Finally, after hearing the evidence against him before Mr. Dunberry, the complainant subsequently simply chose not to attend the proceedings in order to defend himself.

32. The union argues that if the Board is to look into the internal affairs of the union at all it would only be to consider whether or not those who participated were acting on a "vendetta". In arguing against that conclusion, it points to the evidence that the union is not seeking to recover all the monies lost. Nor were the various appeal processes a "rubber stamp". It points to the evidence that the findings against Mr. Sciceluna were overturned on appeal. Although the complainant implied throughout that Mr. Joudrey's responsibility was greater than his, the union says that Mr. Joudrey was in fact assessed a higher fine.

33. The union argues that the complainant acknowledged the duties required of him as treasurer. They are not limited to matters of theft or fraud. The complainant admitted to at least the mismanagement of the funds. The union has been aware that the complainant is refusing to pay any amount in respect of a fine.

34. Finally, the union asserts that it is entitled to rely on Article 5.01 of the collective agreement. It asserts that the fine is not unreasonable. On the contrary, it is the complainant who is being unreasonable in seeking some 31 weeks of wages when he has admitted to mismanagement of funds over a period of years. The actual consequences of that mismanagement to the complainant has been a loss of three weeks of work. It asserts that the consequences to the members of the union were much more severe. The union asks that the Board dismiss the complaint.

35. The employer adopts the union's argument. With respect to the issue of reasonableness

of the fine it also refers to the evidence that the complainant had agreed that he should repay at least \$6,000.00.

36. With respect to remedy the employer asserts that it cannot be found to have violated section 46(2) so no remedy can be ordered against it. It adds that there is no evidence with respect to the complainant's assertion that the union and company acted together. It asserts that in any event, the Board has no jurisdiction to award severance pay, only damages. It asks the Board to dismiss the complaint.

37. The complainant did not add to his submissions in reply. The respondents did not rely on section 46(3) of the Act.

IV

38. The complainant asserts that the union ought not to be able to tell the employer who it can fire. In many circumstances, that would be true. However the collective agreement in this case provides that:

Article 5 - Union Security and Check-off

5.01 ...

B) Members of the bargaining union shall as a condition of employment maintain membership in good standing for the duration of this agreement. In the event the local union resolves to suspend or expel a member for non-maintenance of membership or for cause, the company shall be notified by the local union at least seven (7) days prior to the effective date of such action.

39. The provision is clear and requires employees in the bargaining unit to maintain their membership in the union or risk termination from employment. There is nothing in the *Labour Relations Act* which prohibits employers and unions from including a union security provision in their collective agreement. Indeed, section 46 expressly permits the inclusion of such provisions. By virtue of section 50 of the Act the collective agreement is binding on the employer, the union, and the employees in the bargaining unit including the complainant (see also *Carlton Cards Ltd.*, [1986] OLRB Rep. Dec. 1673, at paras. 17-21).

40. However, section 46 also regulates the enforcement of union security provisions. Inherent in section 46 is the recognition that with the existence of union security provisions in a collective agreement comes the potential for abuse. Expelling an individual from membership in the union and enforcing the union security provision may have immediate and dramatic effects on that individual's job security. Section 46(2) is designed to protect union members against the inappropriate use of the union security provision by the union. However, that does not mean that a union member is thereby absolved from the responsibility to abide by the terms of the union's constitution and by-laws. As in any contractual relationship all parties bear responsibilities and obligations under the contract in addition to receiving the benefits which flow from it. Section 46(2) is an attempt to balance the union's legitimate interest in organizational security and the individual's legitimate interest in continued union membership and employment.

V

41. In *William Egan*, [1985] OLRB Rep. Aug. 1192 the Board concluded at paragraph 12 that the phrase "other assessments" in subsection 46(2)(g) is broad enough to include

"any monetary claim by the union against the specific individual member seeking the protection

of section 46(2) ... it is our view that the section is broad enough to deal with fines levied against an individual ...”.

There is no dispute that the complainant can seek to rely on this provision of the Act.

42. The task before this panel is to assess the reasonableness of the fine levied against Mr. Connell in the circumstances of this case, in order to determine whether or not he is entitled to the protection afforded by subsection 46(2)(a)(g) of the Act.

43. The Board has dealt with the issue of “reasonableness” in section 46(2)(g) in only two reported cases. In *George Zebrowski*, [1977] OLRB Rep. March 143, the Board found that fines totalling \$17.00 assessed against the member for non-attendance at union meetings over a period of three years were reasonable. The member had been expelled and as a consequence was terminated from his employment for failing to maintain his membership as required by the collective agreement. The complaint also alleged a violation of section 60 (now section 68) of the Act. Although the conclusion that the fines were reasonable was reached with particular regard to their size, the Board did review evidence of the requirements of the union’s constitution and evidence of the process conducted by the union in reaching its conclusions. It also reviewed the participation (or lack thereof) of the complainant in that process, and concluded that there was no violation of either section.

44. In *William Egan*, *supra* charges had been brought against Mr. Egan, a union member, by Mr. Last, a business manager of the union. The charges alleged that Mr. Egan had violated the union’s constitution and by-laws by *inter alia*, conducting himself in a manner unbecoming a member, being abusive of fellow members and officers, interfering with an elected union official, failing to render assistance to a business representative and engaging in activity tending to bring the union into disrepute. The Trial Board of the union which included Mr. Last’s brother, found Mr. Egan guilty and assessed amounts totalling over \$4,200.00 against him.

45. Before the Board the respondent union argued that the only issue in considering “reasonableness” was the quantum of the fines. In that Mr. Egan was able to pay them the union argued, the amounts could not be said to be unreasonable.

46. The Board’s approach to assessing “reasonableness” was addressed as follows:

13. ... With the greatest of respect to counsel for the respondent we cannot accept such a narrow interpretation of clause (g). It may very well be that the size of a fine, in and of itself, would entitle the Board to determine that the fine was unreasonable. For example, a hundred thousand dollar fine against an individual by a trade union might on its face be said to be totally unreasonable. On the other hand, the largeness of a fine may in turn be justified by a trade union. It is, for instance, not uncommon for trade unions, where members have crossed the picket line, to subsequently fine the members to the extent of their earnings while crossing the picket lines. This may in turn be a substantial amount of money. However, the union can justify the imposition of such a large fine by saying that the member who crossed the picket line and did not support a strike should not be in a better position than those that did not cross the picket line and, therefore, the excess monies earned can be taken away as a fine by the union levied against its member. Accordingly, we are of the view that although the quantum of the fine is a major component assessing its reasonable or unreasonableness it is not solely determinative of that issue.

14. Rather, we are of the view that in assessing the reasonableness or unreasonableness of a fine levied against a member the Board is entitled to look at the context in which the fine is levied, thus the Board is entitled to examine whether “the punishment fits the crime”. Clearly, if a large fine is the result of a trivial offence it is open to the Board to say that the fine levied is unreasonable within the meaning of section 46(2)(g). Similarly, an unreasonable process might lead to a finding that the fine is not reasonable. *In the present case the conduct of Ron Last and*

the two Trial Board's which levied the fine against Egan can only be interpreted as a blatant attempt to get rid of Egan. As we have noted, both instances resulted in penalties being imposed by the employer (a warning followed by a suspension for the second offence). Both penalties were instituted by the trade union. The charges by Last, over an interpretation of the collective agreement which can best be regarded as silly, (that he doesn't have to inform a foreman that he wants to talk to his crew) lends a sense of unreality to the charges brought by Last against Egan. This sense of unreality is heightened by the allegation that "the stature of the whole brotherhood" is brought into disrepute by an argument between Egan and Last. That these should result in substantial fines, the consequence of which would be a refusal by Egan to pay, can only lead to the conclusion that the purpose of the charges was in fact to drive Egan out of the trade union, and from his job at Ontario Hydro. To do this by levying an unreasonable fine against a member is precisely what section 46(2)(g) of the Act speaks to, and it is conduct of the trade union from which Egan is entitled to be protected.

[emphasis added]

47. A determination whether "fees, dues or other assessments" are reasonable in section 46(2)(g) will depend on the circumstances of each case. With respect to a fine, the nature and extent of the "offence" at issue, the process conducted leading to the assessment, the size of that assessment, and the nature of the relationship between the parties are all relevant factors.

48. Having said that, we want it to be clear that we will scrutinize these matters only to the extent required for the purpose of section 46(2). The contract which exists by virtue of the union's constitution and by-laws is not regulated or enforced by the Board in the ordinary course. That is a matter for the courts. Thus the Board does not intervene in internal union affairs except to the extent required by the Act.

49. This is evident in the Board's approach to complaints under sections 68 and 69 of the Act where the Board is required to determine whether or not the union has acted in a manner that is "arbitrary, discriminatory or in bad faith" in the representation (or referral) of employees. For example, in *Ontario Hydro*, [1980] OLRB Rep. July 1039 (a complaint under section 60a, now section 69 of the Act) the Board stated:

15. ... While this Board has no specific authority under the Act to undertake any sort of watchdog role over a union's internal processes under its constitution and by-laws, the Act clearly gives it authority to determine whether a union had breached its section 60a duty. This in turn may require the Board to examine the union's conduct under its constitution and by-laws. While the Board is reluctant to invade the internal procedures of a trade union, it does so when it becomes essential to the exercise of the Board's authority and responsibility under the Act. See for example, the Board's decision in *George Zebrowski*, [1977] OLRB Rep. Mar. 143, in which the Board reviewed the procedures followed by the trade union under its "Constitution and Laws" in expelling the complainant from membership in the union, as a consequence of which the complainant was discharged from his employment. Another example of the Board finding it necessary to review a trade union's internal procedures is found in the Board's decision in *Rupert S. Martin*, [1977] OLRB Rep. Oct. 671. The Board in that case, in order to determine whether section 60a of the Act had been breached, reviewed the internal decision-making process by which the respondent trade union decided not to refer the complainant to any employers who were seeking to employ members of the respondent through its hiring hall. In that same decision the Board dealt also with a question of whether one officer of the trade union had authority to make the decision not to refer the complainant to employment. In dealing with that issue, the Board acknowledged that it "... does not have the authority to police union constitutions and by-laws." and then stated:

"This is not to say, however, that where a union's constitution or by-laws have been deliberately flouted or where certain steps have been taken notwithstanding a challenge that they might be in violation of the constitution or by-laws, that those actions might not be a relevant factor in determining whether or not a breach of section 60a has occurred."

In a like manner, the Board finds it essential in the circumstances of the instant case to review how the complainant was dealt with by Local 506 under its constitution and by-laws in order to determine whether there has been a breach of section 60a of the Act.

50. In that case, officers of the union had refused to accept the complainant's dues and to put him on the out-of-work list. The complainant had not been provided with any reasons for those actions. When it became apparent that they were contrary to the constitution a union official filed charges against the complainant on different grounds. No reasons were provided to the Board as to why the union had waited eight months to lay these charges. The Board concluded that in the circumstances the various actions of the union were designed for the sole purpose of denying the complainant his right of referral. Thus, the Board found that the union had acted arbitrarily and in bad faith.

VI

51. In this case the complainant contends that he didn't steal any money, and, therefore, shouldn't have to pay the union anything. This is, it seems, a misunderstanding of the union's legitimate concern. In reviewing the various decisions and the evidence of the union it is clear that the union was concerned with more than theft or fraud. The complainant had been entrusted with serious responsibilities as treasurer. The amount of money admitted missing represents over one-third of the union's entire revenues (both union and special strike funds) for the three-year period in question. As treasurer, the complainant was responsible for ensuring that the union's funds were being spent appropriately for union business and to account for same. Even absent theft or fraud it would be entirely reasonable for a union to feel significant concern over a "missing" \$120,000.00.

52. However the union does not accept the complainant's assertion that he was only responsible for the mismanagement of funds. It holds that view as a result of the internal appeal process which it undertook. Those findings are reproduced earlier. The complainant asks the Board to accept his proposition that he didn't steal any money so therefore the fine is unreasonable. However it is not the role of this Board to determine the complainant's guilt or innocence of the charges. That is the union's responsibility under its constitution. The issue before this Board is whether the fine assessed as a result of the process is reasonable in the context of section 46(2)(g) of the Act.

53. In reviewing the process conducted by the union we refer to our earlier remarks at paragraphs 48 and 49. We are not determining whether or not the strict contractual terms of the constitution were met with respect to the trial and appeal processes. Should the complainant seek to challenge the contractual validity of the process (which he has not before us), that is a matter for the courts. However, it is appropriate for us to review that process to assist in determining the reasonableness of the fine. Inherent in that is the question of whether the union is seeking to assess such a fine so that it can rely on the union security provision in the collective agreement for an inappropriate purpose.

54. Consequently, we have asked ourselves whether the process engaged in by the union arose from a legitimate concern. We have already concluded that such was the case. Further, was the process itself fair to the complainant in the sense that he had a fair opportunity to hear the case against him and to defend himself against the charges? Although we are not certain on the evidence before us that the constitution was complied with in every respect, it can be seen that the complainant was afforded real opportunity to both hear the evidence against him and to answer the charges. Mr. Aguis acted in a sense as prosecutor by providing to the tribunal committee, the membership and Mr. Dunberry the findings of the investigations. Those materials were provided to the complainant's counsel specifically in order to prepare a defence. None was forthcoming. The

process did not deny the complainant time to prepare. We are satisfied that having regard to the process conducted, including the complainant's participation in that process, the union acted reasonably in relying on those conclusions in imposing a fine.

55. Prior to that the union had shown flexibility and a desire to resolve matters by entering into the agreement which was then repudiated by the complainant. That agreement specifically contemplates the complainant retaining his membership in the union.

56. The only element that argues for finding the fine to be unreasonable is its amount. The union did not lead any evidence which would indicate why or how it had chosen \$12,000.00 as the appropriate amount. The fact that a union leads no evidence with respect to their deliberations on the amount or terms of a fine may in some circumstances, support an inference that it set the fine knowing that the effect would be the individual's inability to pay, thereby providing grounds for expulsion. However, the complainant conceded that on the union's view of events, the amount was reasonable. Moreover, the circumstances of this case do not warrant the drawing of such an inference.

57. As was said in *William Egan, supra*, a large fine imposed for a trivial offence may lead to the conclusion that the fine is unreasonable. Again, it is a question of balance. The member has been found to be in violation of the union constitution. The union is entitled to enforce the constitution by assessing a fine. In this case the offence is extremely serious with important consequences for the union and its members. The complainant was tried and found guilty in circumstances that allowed him a fair opportunity to defend himself.

58. Although the union and the members were clearly upset by these events, there is no evidence of the kind of animosity evident in *William Egan, supra*.

59. In the circumstances of this case, the \$12,000.00 amount is not so out of proportion as to suggest that the union's real purpose was to deprive the complainant of his membership in the union. Thus, the amount, although large, does not take the fine out of the realm of reasonableness.

60. Finally, we note that the union membership accepted the recommendation for a \$12,000.00 fine to be paid over a period of 36 months. The final communication to the complainant from the union on December 14, 1988 demanded payment in full by January 27, 1989. The complainant did not suggest that this constituted a change in the fine so as to make it unreasonable. We heard no evidence as to whether the union constitution provided that the launching of an appeal would automatically stay any penalty. However in light of the fact that the complainant did not challenge this and his clear position that he had no intention of paying any amount in any event we are not prepared to conclude in this case that this affects the reasonableness of the fine.

VII

61. We conclude therefore that the fine imposed by the union in the circumstances of this case was not unreasonable. The offence was a very serious one, the process conducted by the union in reaching its conclusions on the charges was not arbitrary or otherwise improperly motivated, nor is the amount so out of proportion in the circumstances so as to warrant a different conclusion. There is no evidence to suggest that the union was engaging in an exercise designed to strip the complainant of his membership in the union. Having regard to our conclusion, the union was therefore entitled to expel the complainant from membership for his refusal to pay the fine.

62. This complaint is dismissed.

2225-87-G; 2226-87-G The **Electrical Power Systems Construction Association**, Applicant v. Ontario Allied Construction Trades Council and Labourers' International Union of North America and Walter Fougere, Respondents; The Electrical Power Systems Construction Association, Applicant v. Ontario Allied Construction Trades Council, Donald E. Hickey and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondents

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *D. A. MacDonald* and *N. A. Wilson*.

APPEARANCES: *John C. Field* and *Sheila Goldsworth* for the applicant; *A. M. Minsky* and *John Marchildon* for all respondents, together with *R. Burns* for the respondent Teamsters, Chauffeurs, Warehousemen and Helpers of America, *G. Flook* for the respondent The Labourers' International Union of North America.

Arbitration - Construction Industry - Construction Industry Grievance - Practice and Procedure - Employer seeking arbitration of claim against individual employees - Union and employees alleging that failure to serve grievance on individual employees meant no delivery on "other party" as required by Act - "Other party" is local union, even where relief sought against individual employee - Board dismissing one of grievances for delay in filing without reasonable explanation

DECISION OF THE BOARD; March 27, 1990

1. In these two grievances filed pursuant to section 124 of the *Labour Relations Act*, the parties characterized as a preliminary issue the question of whether an employer party to a collective agreement (in this case EPSCA on behalf of Ontario Hydro) can seek through arbitration to enforce the rights or obligations it asserts are contained in the collective agreement against individual employees, whom it claims have breached the agreement. They also raise the question of whether delivery of the written grievance "to the other party", within the meaning of section 124(2) of the Act, means delivery upon employees named as respondents in the section 124 application. The two proceedings were therefore heard together.

2. The Teamsters are hereby added as a respondent to Board File No. 2226-87-G as if they had been initially named as such by the applicant.

3. In Board File No. 2225-87-G (the "Fougere grievance"), EPSCA asserts, on its own behalf and on behalf of Ontario Hydro, that Mr. Fougere failed to return to Ontario Hydro, upon his termination of employment, tools and equipment valued at slightly under \$500.00. EPSCA and Ontario Hydro (for ease of reference we will refer to them as the "employer") assert that this constitutes a violation of Articles 10, 11, and 26 of the Master Portion of the collective agreement. The employer demands that Fougere either return the items in good condition or make payment for the articles not so returned.

4. In Board File No. 2226-87-G (the "Hickey grievance"), the employer asserts that Donald Hickey claimed and received room and board subsistence allowance provided pursuant to the collective agreement, in the total amount of \$18,468.50, encompassing the period from October 24, 1983 to June 18, 1986 and that Hickey improperly claimed and received such funds contrary to the provisions of the collective agreement, in particular Article 20 thereof. Amongst other remedies, the employer asks that the Board order Hickey to repay this amount to Ontario Hydro.

5. Both applications were filed with the Board on November 10, 1987. The first hearing date was set by the Board for November 25, 1987. At the parties request, that hearing date was adjourned *sine die*. On three subsequent occasions at the request of either or both of the parties, the Board set additional hearing dates, and the parties again agreed to further adjournments on consent. In the result, this matter was heard by the Board on October 10, 12 and December 11, 1989.

6. This decision deals only with three preliminary issues or objections raised by the respondents. First, the respondents assert that both grievances are inarbitrable and ought to be dismissed. Second, the respondents assert that the written grievance was not delivered to the individual employees named as respondents contrary to the provisions of section 124(2) of the Act, and accordingly both proceedings must be dismissed. They also assert, in the Hickey grievance, that delivery was not made upon the "accredited representative" of the union, as required by the collective agreement, and therefore that grievance must be dismissed. Third, with respect to the Hickey grievance only, the respondents in that proceeding assert that on timeliness grounds the grievance ought to be dismissed, as the applicant has delayed too long in pursuing the matter.

7. The parties agreed on the facts but only for purposes of these preliminary issues. The parties also agreed that the exhibits that formed part of the agreed facts could be taken as exhibits for all purposes in these proceedings, including the merits should matters proceed to that stage.

The Facts

A. The Fougere Grievance

8. The applicant and the respondent Ontario Allied Construction Trades Council (hereinafter the "Council") are parties to a collective agreement which was in full force and effect as of the relevant time. There is no dispute that the Labourers and Fougere are bound by the agreement. In the Labourers' Appendix to the Master Portion of the agreement can be found Article 10 (Tools) and Article 11 (Protective clothing and equipment). Article 11.3 reads in part, as follows:

The protective clothing and equipment covered in sections 11.1 and 11.2 of this Article that is provided by the Employer shall be charged out to an employee and the employee shall be responsible for the return of such clothing and equipment to his Employer.

Fougere was a member of Local 597 of the Labourers and was employed by Hydro commencing on or about August 20, 1983. On or about July 27, 1987, for reasons unrelated to tools, equipment, or the instant proceeding, Fougere's employment was terminated.

9. Approximately two weeks later, about August 13, 1987, the General Superintendent of Hydro's Darlington Generating Station wrote to Fougere and a representative of Local 597 of the Labourers alleging that Fougere had failed to return specified tools and equipment and demanding that they be returned immediately to Hydro. The letter also advised Fougere that Ontario Hydro, through EPSCA, was in the process of filing a grievance against both the Labourers and Fougere. On the same day, the General Manager of the applicant EPSCA sent a notice of grievance to the representative of Local 597 of the Labourers, setting out the employer's grievance and indicating that the employer considered such to be a violation of Article 26 of the Master Portion of the agreement and Articles 10 and 11 of the Labourers' Appendix. The employer demanded that Fougere either return the items in good condition or make payment for the articles not returned. This letter was copied to the Council.

10. A second step grievance meeting was held on October 9, 1987. The grievance was referred to the Board pursuant to section 124 of the Act on November 10, 1987.

B. The Hickey Grievance

11. Hickey was a member of Local 230 of the Teamsters and was employed by Ontario Hydro commencing on or about May 1, 1982. On or about November 23, 1983, Hickey was working as a Teamster at the Darlington Nuclear Power Generating Station Project and he applied to Ontario Hydro in the manner required by the collective agreement for room and board subsistence allowance. The terms and conditions of Hickey's employment were governed by the provisions of the Master Portion of the collective agreement referred to earlier.

12. Article 19.2 reads in part, as follows:

19.2 The following conditions will apply for employees whose regular residence* is more than 97 radius kilometers from the project:

(a) An Employer may supply either:

(i) Room and board in camp or a good standard of board and lodging within a reasonable distance of a project; or

(ii) a subsistence allowance;

subject to Section 19.2(b), (c) and (d) below.

REV(b) An employee may exercise his option not to stay in a camp or accept room and board. An employee who exercises this option and qualifies for subsistence allowance shall receive a subsistence allowance of \$32.00 per day (effective May 1, 1987, \$33.00 per day) for each day worked or reported for subject to Sections 19.2(c) and 19.2(d) below.

REV(c) To qualify for subsistence allowance an employee must maintain temporary accommodation at or near a project. Employees who travel daily to locations beyond 97 radius kilometers from the project will be entitled to \$21.00 per day worked or reported for.

REV(d) An employee employed at the Pickering or Darlington Project who qualifies for a subsistence allowance as provided for above shall receive a subsistence allowance of \$22.00 per day for each day worked or reported for.

* An employee's "regular residence" is the place where he maintains a self-contained domestic establishment (a dwelling house, apartment or similar place of residence where a person generally sleeps and eats) in which he resides and for which he can show proof of financial commitment in accordance with the "Application for Daily Travel/Room and Board Allowance" as agreed to by the parties.

13. In the "Application for Daily Travel/Room and Board Allowance" referred to in Article 19, the employee is required to fill out certain information. Just above where the employee signs and dates the Application is printed the following:

I declare that I have read and understand this form and that all the foregoing information is true and complete. I understand that a false statement regarding my regular residence may be cause for disciplinary action up to and including termination. My signature acknowledges my receipt of a copy of this application.

14. Hickey received room and board subsistence allowance, eventually totalling \$18,468.50, beginning on October 24, 1983. On or about March 27, 1986, Ontario Hydro received information from an anonymous source that the regular residence for Hickey was in Oshawa, Ontario, and not Coe Hill, as claimed in Hickey's application for the subsistence allowance. Ontario Hydro investigated this matter over a number of months following receipt of this information. Hickey continued

to receive allowance payments until June 18, 1986. The agreed facts do not stipulate whether these payments stopped because Ontario Hydro took action to terminate them, only that they ceased as of this date.

15. On or about January 26, 1987, a meeting was arranged between officials from Ontario Hydro, Hickey and his chief steward, R. Harrison. Harrison was not an "accredited union representative" of the Teamsters, as described in Article 7. Hickey was advised of Ontario Hydro's claim that he had improperly received \$18,468.50 in subsistence allowance, during the time periods noted. Harrison was advised that Ontario Hydro was considering a number of responses, including the delivery of a management grievance.

16. On or about February 27, 1987, a further meeting was held again, between officials from Ontario Hydro and Hickey and Harrison. At the outset of that meeting, a notice of grievance, dated February 27, 1987, was delivered by J. Ella, on behalf of Ontario Hydro, to Harrison. That document was addressed to the Teamsters, and stated that it would serve as notice of grievance by EPSCA and Ontario Hydro against the Teamsters and Hickey. The letter asserted that Hickey had "illegitimately been in receipt of board allowance monies from Ontario Hydro since November 23, 1983." EPSCA and Hydro demanded that Hickey make immediate restitution of those monies. The letter indicated that the employer would be contacting the union's international representative in order to set up a second step grievance meeting. Also at that meeting, Hickey's employment was terminated, effective that day, on the grounds that he had improperly applied for and received room and board allowance for a prolonged period of time. A notice of termination was provided to Hickey, with copies to R. Burns and R. Harrison of the Teamsters.

17. On May 4, 1987, EPSCA sent a letter to the respondent Council enclosing a copy of the February 27, 1987 grievance. On May 26, 1987, a second step grievance meeting was held, attended by representatives of the Council and the Teamsters.

18. The grievance was referred by the applicant to the Board pursuant to section 124 of the Act on November 10, 1987.

19. Finally, by way of context, the employer had been seeking, in an unrelated matter, recovery from an individual employee of sums alleged owing, through means of court action (see *EPSCA* [1987] OLRB Rep. Aug. 1079 "Fleming grievance"). The District Court dismissed the employer's claim in August, 1985, on jurisdictional grounds, on the basis that the courts had no jurisdiction to deal with such matters. This decision was upheld by the Divisional Court on March 13, 1986. The Court of Appeal refused leave to appeal on April 28, 1986.

Are these grievances arbitrable?

20. The parties referred to the following sections of the Act:

44.-(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

...

(10) The decision of an arbitrator or of an arbitration board is binding,

(a) upon the parties; and

(b) in the case of a collective agreement between a trade union and an employ-

ers' organization, upon the employers covered by the agreement who are affected by the decision; and

- (c) in the case of a collective agreement between a council of trade unions and an employer or an employers' organization, upon the members or affiliates of the council and the employer or the employers covered by the agreement, as the case may be, who are affected by the decision; and
- (d) upon the employees covered by the agreement who are affected by the decision,

and such parties, employers, trade unions and employees shall do or abstain from doing anything required of them by the decision.

50. A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

124.-(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

(3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and the provisions of subsections 44(6), (8), (9), (10), (11) and (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

And they referred to section 3 of the *Rights of Labour Act*:

3.-(1) Any act done by two or more members of a trade union, if done in contemplation or furtherance of a trade dispute, is not actionable unless the act would be actionable if done without any agreement or combination.

(2) A trade union shall not be made a party to any action in any court unless it may be so made a party irrespective of any of the provisions of this Act or of the *Labour Relations Act*.

(3) A collective bargaining agreement shall not be the subject of any action in any court unless it may be the subject of such action irrespective of any of the provisions of this Act or of the *Labour Relations Act*.

(4) Nothing in this Act shall be construed to prevent or otherwise affect the prosecution of a trade union or a member thereof under the *Labour Relations Act*.

21. We set out now, in abbreviated fashion, the parties' submissions on this issue. The respondents submit that both grievances are inarbitrable as neither the individually named employees, nor the unions, nor the Council are proper respondents to either the grievances or the instant applications.

22. With respect to whether the unions or the Council are proper parties, the respondents

note that no violation of the collective agreement has been alleged against them nor any remedy or relief claimed against them. Further, submit the respondents, there is no and can be no suggestion that the Council is liable for any misconduct of Hickey or Fougere, or for that matter for any misconduct of its member unions. As no obligation is claimed to have been breached by these parties, and no remedy sought against them, they are not proper respondents and the proceedings ought to be dismissed as against them.

23. With respect to Fougere and Hickey, the respondents assert that there is no authority which holds or permits an individual employee to be grieved against by an employer or made a party respondent against whom a remedy can be obtained pursuant to the provisions of section 124. The respondents note that section 124, while explicit with respect to who can be an applicant, is silent with respect to who can be a respondent. As the respondents put the issue, an individual employee cannot be a proper respondent to a grievance or section 124 proceeding at the instance of the employer. Rather than allowing an employer to initiate arbitration against an individual employee other mechanisms are available and are appropriate. Employers can discipline employees, and if necessary seek compensatory awards in any subsequent arbitration. Employers can also file unfair labour practice complaints pursuant to section 89 of the *Labour Relations Act*.

24. The respondents concede that employees are bound by the collective agreement through the provisions of section 50 of the Act, and bound by an arbitration board's decision through the provisions of section 44(10) of the Act. However, they submit that the issue of whether employees are so bound is a different matter from the issue before this Board: whether at the instigation of an employer party to the collective agreement the arbitration mechanism is available for enforcing alleged obligations contained therein against individual employees. The respondents submit that the foundation of collective bargaining is the bilateral relationship between the employer (or its authorized representative, such as EPSCA) on one hand, and the union (or its authorized representative, such as the Council) on the other hand. To allow these disputes to be arbitrated on the merits would undercut the very rationale for and structure of collective bargaining. The respondents note that this is a case of first impression, and argue there is good reason for over forty years of jurisprudence without this question arising for arbitration. They submit this lengthy dormant period reflects the abilities of the bilateral parties to govern their affairs, and demonstrates that there has not been a serious, or even detectable, problem of employers being left without remedies to enforce alleged obligations. If that were the case, argue the respondents, this issue would have been adjudicated long ago. Put colloquially, "if it ain't broke, don't fix it."

25. Apart from the deleterious effect that employer grievances against individual employees would have on the bilateral nature of the collective bargaining relationship, it would unfairly treat individual employees. As the Hickey case demonstrates, assert the respondents, on the same day Hickey was both terminated because of and grieved against with respect to the alleged improper receipt of room and board allowance. This constitutes a double penalty, and ought not to be allowed. The respondents submit that the appropriate procedural mechanism was for Hickey to have been terminated only, and the union then could assess whether a grievance against such discharge was appropriate. As the party to the collective agreement, and the representative of the employee, the union was the appropriate party to decide whether to enmesh an individual employee in arbitration, and not the employer. In any arbitration resulting from the union's decision to dispute the termination, the employer would be able to both defend its decision and seek compensation of the money it claimed was misappropriated. Just as an individual employee cannot make the decision as to whether a grievance goes to arbitration, neither should an employer be able to grieve or seek arbitration against an individual employee. The respondents note that arbitration is a mechanism which deals with disputes between the parties to the collective agreement, and not the employer and individual employees bound by the agreement. The respondents further

submit in this regard that the provisions of section 44(10) of the Act only render employees individually liable if the arbitration board's orders or directions can first be made against the union party to the collective agreement. They argue that in this circumstance, the provisions of section 44(10) also make employees liable for those arbitration decisions.

26. The respondents refer to the following decisions:

The Electrical Power Systems Construction Association, [1976] O.L.R.B. Rep. Dec. 825

Heist Industrial Services, 63 C.L.L.C. para. 16,263

Metropolitan Toronto Apartment Builders Association, (1972) 1 L.A.C. (2d) 201 (H.D. Brown)

The Lummus Company Canada Limited, and The Ontario Erectors Association, [1976] O.L.R.B. Rep. Jan. 980

J.G. Rivard Limited, [1976] O.L.R.B. Rep. Sept. 540

Canada Elevator Manufacturers Association, [1976] O.L.R.B. Rep. Dec. 816

Ainsworth Electric Co. Limited, [1977] O.L.R.B. Rep. July 399.

J.G. Rivard Limited, [1980] O.L.R.B. Rep. July 1009

Eastern Sheet Metal and Mechanical Contractors, [1981] O.L.R.B. Rep. Jan. 26

Ontario Hydro, [1985] O.L.R.B. Rep. April 582

Ontario Hydro, [1986] O.L.R.B. Rep. Aug. 1137

Ontario Produce Co., Oshawa Foods Division of Oshawa Group Ltd. and Teamsters Union, Local 419, (1986) 26 L.A.C. (3d) 159

The Electrical Power Systems Construction Association, (Fleming grievance) [1987] OLRB Rep. Aug. 1079

27. The employer responds by noting that if the respondents are correct, then the employer would in many cases be without any remedy whatsoever. The employer notes that the courts will not entertain litigation involving interpretation of the collective agreement, for such is proscribed by sections 3(3) of the *Rights of Labour Act* and 44(1) of the *Labour Relations Act*. (The respondents did not dispute this assertion: in this respect, for example, see *EPSCA* [1987] OLRB Rep. Aug. 1079 "Fleming grievance".)

28. With respect to the appropriateness of naming the Council and the member union(s) as respondents to the section 124 proceedings, the employer argues that as they are agents for the employees, and parties to the collective agreement, they must be part of the section 124 proceeding, even though no relief is claimed against them.

29. The employer submits that Articles 29.5 and 30 of the collective agreement give the

employer the right to file the instant grievances against individual employees. Article 29.5 reads as follows:

EPSCA OR COUNCIL GRIEVANCES

The processing of EPSCA or Council grievances will begin at the Second Step. EPSCA or the Council may submit either policy or specific grievances. Such policy or specific grievances shall be submitted within thirty (30) days of the alleged grievous act.

30. EPSCA asserts it is specifically given the authority in Article 29.5 to file either policy or specific grievances. There is no limitation found therein with respect to who grievances can be launched against. The employer therefore claims that "specific" grievances can be filed against individual employees, just as unions can grieve on behalf of individual employees. The combined effect of sections 44(10) and 50 of the *Labour Relations Act* are that both the collective agreement and any arbitration decisions or awards made thereunder are binding on employees. Section 124(3) is explicit that section 44(10) applies to proceedings under section 124. It is clear therefore, submits the applicant employer, that the arbitration board can make orders directly against employees. The employer has named the two individual employees as respondents to the section 124 applications, and therefore the Board has the authority to make a finding that they have breached the agreement and to issue remedial orders against them. The employer argues that fairness and reciprocity demand that if an employee can breach the collective agreement, the employer must be entitled to pursue such a breach through the grievance procedure and arbitration. The status of an individual as a party to the collective agreement cannot be a prerequisite to a remedy, for to so hold would be to deprive the employer of a remedy where the interpretation of the collective agreement is involved. To paraphrase the employer's argument, one does not have to be a party to the collective agreement, though one must be bound by it, in order to be a respondent to a section 124 proceeding.

31. The employer acknowledges that discipline may be both available and appropriate in many circumstances. But it is not always available to an employer. For example, submits the employer, Fougere was terminated from his employment for reasons unrelated to the claim that he took or failed to return tools or equipment. Fougere was no longer an employee at the time discipline for the tools dispute would have been contemplated or imposed. Fougere was therefore not an employee whom the employer could have disciplined. The employer could not seek redress in Court as an interpretation and alleged violation of the collective agreement was involved. If the employer cannot file a grievance and take it to arbitration, it is effectively deprived of an opportunity to enforce its rights and seek a remedy. Similarly, submits the employer, even if discipline is an available response, it is unfair to limit employer responses to the imposition of discipline. To do so would deprive the employer of an opportunity and mechanism to seek recovery of monies improperly paid. Surely, it argues, whether it can seek recovery of monies is not limited to cases where the party opposite in interest, the union, chooses to file a grievance. The employer argues that it is the Board's function, under section 124, to interpret and apply the collective agreement and to balance the various interests of the parties and there is no reason employers cannot equally avail themselves of this mechanism.

32. The employer referred to the following decisions:

Heist Industrial Services, 63 C.L.L.C. para. 16,263

Bennett & Wright Contractors Ltd. (1969), 20 LAC 187 (Godin)

Re H. Fine & Sons Ltd. (1984), 15 LAC (3d) 236 (Roach)

Standard Coil Products (Canada) Ltd. (1971), 22 LAC 377 (P.C. Weiler)

Canadian Admiral Corp. (1967), 19 LAC 1 (Arrell)

St. Joseph's Hospital, London (1985), 20 LAC (3d) 390 (Kates)

Ontario Hydro, [1983] OLRB Rep. Sept. 1547

Hamilton Street Railway Co. v. Northcott (1966), 66 CLLC 14,157 (SCC)

Re Samuel Cooper & Co. Ltd. (1973)m 35 DLR (3d) 501 (Ont. Div. Ct.)

Shell Canada v. Travailleurs Unis du Petrole, [1980] 2 S.C.R. 181

33. We are asked to decide, by way of a ruling upon a preliminary objection, whether an employer party to a collective agreement (or in the instant case, EPSCA on its own behalf and on behalf of Ontario Hydro) can use the grievance and arbitration mechanism contained in section 124 of the Act in order to seek enforcement of a collective agreement obligation asserted against an individual employee bound at the relevant time by the collective agreement. We are not, at this stage, asked to decide what the parties have characterized as the merits of the two proceedings, whether any individual obligation under the agreement in fact exists and, if so, whether the individual employee respondents have breached it and whether the employer can obtain a remedy through section 124. Such consideration would involve findings of fact, and analysis and consideration of the articles of the collective agreement dealing with the specific rights or obligations. Although the articles dealing with tools and protective clothing and equipment and room and board allowance were before us, and were referred to by the parties, neither party made submissions as to the nature and ambit of the obligations, if any, of individual employees under these articles, nor were the facts agreed upon for such purposes. The parties asked that this question, which they termed "the merits", be deferred and the Board agreed to entertain their submissions on this basis.

34. Upon reflection, having had the benefit of the parties' thorough submissions, we consider it more appropriate in the circumstances, given the importance and uniqueness of this issue, to hear the entire case and to deal with this issue, if appropriate, after completion of the proceeding. Accordingly, we will reserve our decision on this preliminary issue.

Delivery of the Grievance

35. The respondents argue that the delivery of the written grievance "to the other party" within the meaning of subsection 2 of section 124 of the Act is a condition precedent to the Board entertaining a section 124 application. They submit that the "other party" referred to is any party named by the applicant in the section 124 proceeding, which includes the Council, the unions, and the individual employees. They do not dispute that the grievances were properly delivered to the Council. And it is agreed that delivery was made upon the chief steward. They submit that on the facts (as agreed), the written grievances were not delivered to the appropriate representative of the union, the "accredited representative", nor to the individual employees. They do not argue that the method of "delivery" to the employees was inadequate. They argue rather that whatever constitutes proper delivery, it must be made upon employees Fougere and Hickey and it was not. Therefore the applications ought to be dismissed as the condition precedents have not been met.

36. Section 124(2) reads:

124.-

(2) A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

In addition to the wording of section 124, the respondents rely upon the text of Form 104, the prescribed form for the filing of a section 124 application. Form 104 reads as follows:

Use this form for Construction Industry only

Form 104

LABOUR RELATIONS ACT

REFERRAL OF GRIEVANCE TO ARBITRATION UNDER SECTION 124, CONSTRUCTION INDUSTRY

BEFORE THE ONTARIO LABOUR RELATIONS BOARD

Between:

Applicant,

and -

Respondent.

The applicant refers a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Ontario Labour Relations Board for final and binding determination.

The applicant states:

1. (a) Address and telephone number of applicant:
- (b) Address of applicant for service:
- (c) Address and telephone number of respondent:
- *2. The name and address of any person(s) or trade unions, other than the respondent, who may be affected by the referral: (use attachments if additional space is required)
3. The parties to this application are parties to whom sections 117 to 136 of the Act apply.
4. A collective agreement, a copy of which is appended hereto, was entered into between the applicant and the respondent on the day of , 19 and is operative from the day of , 19 to the day of , 19
5. The matter referred to be arbitrated (full text of grievance is to be reproduced): (use attachments if additional space is required)
6. The date on which the grievance was delivered to the other party:
7. The replies to the grievance, if any: (use attachments if additional space is required)

8. Other relevant statements: (use attachments if additional space is required)

DATED at _____, this _____ day of _____, 19____

signature

*Other employees who may be affected by a determination under this section are entitled to notice of arbitration proceedings and to be represented by counsel or otherwise at the hearing.

FAILURE TO PROVIDE THE NAMES OF EMPLOYEES WHO MAY BE AFFECTED COULD RESULT IN A POSTPONEMENT OF THE HEARING.

37. We agree that delivery of the written grievance is a condition precedent for this Board to entertain a section 124 proceeding. See for example, *Arthur G. McKee & Company of Canada Ltd* (supra); *Arlington Crane Service Limited* [1986] OLRB Rep. April 417.

38. The question before us is whether the written grievance must be delivered to the accredited representative of the union and to the employees named as respondents. Subsection 124(2) merely states delivery must be made "to the other party". There appears to be only one prior Board decision dealing with the meaning of this phrase, the *Arlington Crane* decision cited above. In that decision, the Board wrote, at page 418 therein:

In our view, it is not too onerous to require a party to a collective agreement to deliver a grievance to another party to that agreement before referring the grievance to arbitration before the Board. The failure to deliver the grievance before referring the grievance to the Board under section 124 of the Act is not a mere technicality, but rather prevents the Board from dealing with the merits of the matter.

The dispute with respect to delivery in the *Arlington Crane* case was whether delivery had to be made to an employer which had not itself signed the collective agreement. The Board decided that such delivery was necessary. That decision does not therefore answer the question before us.

39. The relevant phrase in section 124(2) is capable of different reasonable interpretations. In our view, we ought to give the language an interpretation that promotes sound labour relations and the scheme of the Act, particularly the arbitration provisions set out in section 124.

40. We must first look to the policy enshrined in section 44(1), that all disputes with respect to the interpretation, administration or application of the agreement, or its alleged violation, *between the parties*, be resolved through arbitration. In the construction industry arbitrations can be launched through section 124. We note that the relevant language in section 124 was present in the Act before the Act was amended to create the province-wide scheme of bargaining for parts of the construction sector. But it must be interpreted having regard to the realities of the province-wide scheme. Under the province-wide scheme, the Board regularly encounters section 124 applications where the "parties" which actually signed the collective agreement (the provincial organizations that negotiated the agreements) are not the "parties" against which breaches are alleged or remedies sought. Those "parties" are the employer and union bound by the agreement, but not the "parties" who negotiated and signed it.

41. A primary reason for the legislative requirement in section 124(2) that the application under section 124 can only be made after the written grievance has been delivered "to the other party" is to avoid the commencement of litigation before the "other party" with which the applicant has the dispute is made aware of the dispute and has had an opportunity to resolve the matter without resort to arbitration. Arbitration is for the resolution of disputes which the parties in con-

flict are unable to resolve through negotiation or compromise. In the province-wide bargaining scheme, the provincial bargaining agencies are not primarily responsible for and are sometimes unaware of the administration and application of the agreement at the local level. This administration and application occurs between the employer and the union, and it is a dispute between these "parties" over the interpretation, administration or application of the agreement, or over an alleged violation of the agreement, that initially gives rise to the filing of the grievance. It makes far more labour relations sense to read "other party" as including those entities which are involved at the local level in the application and administration of the applicable collective agreement and are the directly involved collective bargaining "parties" to the dispute. It is the local union which will be in a position to investigate a breach alleged against an employee in the bargaining unit.

42. We find support for this view in the provisions of section 147(3) of the Act, which make the employers and affiliated bargaining agents (the "local union" in the terminology used in this decision) "parties" for purposes of section 124 when applications arising from the province-wide I.C.I. sector are involved. Although the instant grievances do not deal with construction in that sector and the parties before us are not subject to the provisions of section 147(3), the disputes have arisen in a context involving umbrella bargaining agents representing local employers and unions.

43. Where a union files a grievance complaining about a particular employer's behaviour, that employer is for practical purposes the collective bargaining party adverse in interest responsible for the administration and application of the agreement. As in *Arlington Crane* (supra), we interpret subsection 124(2) as requiring delivery of the written grievance to that "party" before the Board will embark upon a section 124 enquiry. Similarly, where an employer files a grievance complaining about an employee's behaviour, as in the instant case, the "party" adverse in interest, responsible for the day-to-day administration and application of the collective agreement, is the local union, the Labourers or the Teamsters as the case may be; that is, the local bargaining agent for the employees in the bargaining unit. It is to them that delivery of the written grievance must be made. This interpretation of section 124(2) ensures that those parties responsible by law for the day-to-day operation of the collective agreement, and with the institutional interest in its proper administration and application, and between which the dispute directly lies, are provided with delivery of the written grievance before the section 124 proceeding is filed.

44. In contrast, we do not read subsection (2) as requiring prior delivery of the written grievance to an individual because he or she is named by an applicant as a respondent in a section 124 application, or because an applicant claims they have violated the agreement and seeks a remedy from them. The individual employee has no authority to administer the agreement, nor to represent the employees as bargaining agent. To the contrary, the union upon which prior delivery must be made is legally authorized to act as exclusive agent for the employee with respect to such matters. Little would be served by requiring delivery of the written grievance to the employee as a condition precedent to the section 124 referral to arbitration. The employee is not in a position to deal directly with the employer. He or she cannot settle the dispute as that is a matter between the employer and union, or the provincial bargaining agents.

45. To require that the grievance be delivered to such employees before the filing of the section 124 proceeding would unduly delay the expeditious filing of such proceedings. We are not inclined to give an interpretation to section 124(2) which could seriously impede the filing of section 124 applications. Individual employees' interests can be and are fully protected in the section 124 proceeding itself. Where an applicant alleges an employee has breached a collective agreement obligation and seeks a remedy against the employee, that employee must have notice of the section 124 proceeding and will have an opportunity to fully participate in that proceeding.

46. We can see no reason why delivery of the written grievance to the chief steward is not delivery upon the union. Delivery to Harrison was sufficient although he was not the "accredited" representative as set out in Article 7 of the collective agreement. The collective agreement does not require that grievances be delivered or given only to an accredited representative. We are satisfied that the written grievances were delivered to the respective local unions (see paragraphs 9 and 16 supra), and these two applications were properly referred pursuant to section 124.

Timeliness

47. The final objection applies only with respect to the Hickey grievance. The respondents complain that there was undue delay in the processing of this matter by the applicant, and the Board therefore ought to exercise its discretion to decline to enquire further into the Hickey grievance. The respondents do not argue that the collective agreement provisions set out mandatory time limits. Rather, they argue that the Board ought to exercise its discretion pursuant to section 124 to decline to inquire further. The applicant argues the Board ought to exercise its discretion by inquiring into the merits.

48. Hickey had been in receipt of the room and board subsistence allowance since November 23, 1983. On March 27, 1986, Hydro was apprised by an anonymous source of a potential problem with Hickey's claim and payments of the allowance to him. We note that although Hydro was litigating the Fleming grievance in the courts, attempting to seek recovery of money from individual employees through court process, on March 13, 1986 the Divisional Court upheld the decision of the District Court dismissing the action on the grounds that the court had no jurisdiction. Hydro therefore knew by March 27th that court action was not the appropriate avenue for seeking the type of recovery it sought from Hickey. After receipt of the information on March 27th, Hydro commenced an investigation which took place over a "number of months". There are no facts as to the specific length of the investigation, nor its nature, nor any explanation of why it took whatever length of time it did. Hickey continued to receive the allowance for approximately 3 months until June 18, 1986. Hickey continued to remain an employee of Ontario Hydro. On February 27, 1987, approximately 8 months after he ceased receiving benefits, and 11 months after Hydro first received information suggesting Hickey had not stated his true residence in applying, a meeting took place between the parties, and attended by Hickey. A notice of the grievance and notice of termination of employment were both given to Hickey. A copy of the instant grievance was provided on May 4, 1987 to the Council at the second step grievance meeting. The respondents accept as reasonable the delay that occurred between the filing of the grievance on February 27, 1987, and the conclusion of the second step of the grievance procedure on May 4, 1987. The decision of the Board in *EPSCA* ("Fleming grievance") cited above, was issued in August 1987. The parties had argued the same arbitrability question in that proceeding but the Board in the result did not rule upon it. The instant section 124 proceeding was filed November 10, 1987, 6 months after the conclusion of the second step of the grievance procedure. The only explanation for this further 6 month delay was the employer's assertion that it was awaiting the Board's decision in the Fleming grievance.

49. The period between March 27, 1986, when Hydro was made aware of the problem, and February 27, 1987, when it first put the respondents on notice with the notice of termination and the filing of the grievance, constitutes approximately eleven months. We have been provided with no explanation of why the investigation took "a number of months". Nor have we been provided with any explanation of why it took Hydro 11 months, from when it was advised of the problem, to notify the union and Hickey, nor why it took 8 months from when Hickey stopped receiving the allowance until the grievance was filed.

50. This first period of delay therefore consists of between 8 and 11 months. During this period the respondents would have remained unaware of Hydro's intention to file a grievance or otherwise seek recovery of the money Hydro alleges was improperly obtained. The agreed facts stipulate only that Hickey received room and board subsistence allowance from October 24, 1983 to June 18, 1986. They do not indicate the circumstances under which he ceased receiving these allowances in June, 1986, and we do not therefore conclude or infer that he was effectively put on notice at that time of Hydro's intention to pursue recovery of the sums in question. In addition, from the time the grievance was delivered on February 27, 1987 (and counting only the interval that runs from the conclusion of the second step of the grievance procedure on May 4, 1987) until the section 124 application was filed was a 6 month delay. No reasonable explanation has been provided for this further delay. Awaiting the Board's decision in the unrelated Fleming grievance was not a justifiable reason for not filing the application at all.

51. Under the scheme of the Act, disputes in the construction industry that come before this Board are to be dealt with quickly. The Legislature has particularly recognized that expeditious resolution in this industry is to be encouraged, and this need for expedition is a major reason the legislature gave this Board jurisdiction to hear arbitrations. We need look no further than the provisions of section 124 to observe the legislative directive for expedition; section 124(2) allows parties to apply to the Board immediately after delivery of the written grievance, notwithstanding any restrictions in the collective agreement in this regard, and further, requires the Board to hold a hearing within 14 days of receipt of the section 124 referral. Thus, sound labour relations policy considerations in the construction industry require that, in the absence of special circumstances, parties making referrals to the Board pursuant to section 124 must act expeditiously. To exercise our discretion otherwise would undercut the very purpose of this statutory arbitration scheme.

52. In *Ontario Hydro-Darlington* [1986] OLRB Rep. July 1014, the Board wrote:

But we are not going to go into that. Rather, we are persuaded that this is an appropriate case for the application of the doctrine of *laches*. As the arbitrator in *Algoma Steel*, (1973) 2 L.A.C. (2d) 231 (Andrews) put it, at page 250:

... That the equitable doctrine of *laches* does apply to arbitration cases is settled law. See: *Re Ottawa Newspaper Guild, Local 205, and Ottawa Citizen* (1965), 55 D.L.R. (2d) 26, [1966] 1 O.R. 669; *Re Ottawa Newspaper Guild and The Saanich Firefighters Union, Local 967, and District of Saanich* (1971), 22 D.L.R. (3d) 577, [1972] 2 W.W.R. 134. ...

There is always some element of prejudice to a party having to put in a defence after a delay of this magnitude, and there is simply no justification whatever for the delay which occurred here. The grievor was not, as found in *Canadian Westinghouse*, (1961) 12 L.A.C. 120 (Hanrahan), lulled into believing certain facts on the basis of the employer's representation. Rather, the grievor continued to challenge the employer's assertions throughout - he simply never got around to filing a grievance (until June of 1985). No new fact came to his attention in the "paper" that he found on the floor in the spring of 1984; that was merely an extract from the collective agreement, which was something that was readily available to him from the beginning. *Considerable attention has been given in this province to the question of expediting the handling of grievances, especially in construction, and we think fairness here demands that the grievor would have pursued his perceived entitlement to board allowance a good deal less haphazardly than he did. As we are not, in the circumstances, of the view that the grievor ought now to be permitted to claim compensation for this stale grievance, we are all of the view that the grievance ought to be dismissed.*

[emphasis added]

53. And in *EPSCA* (Fleming grievance) (*supra*), the Board wrote:

13. *Section 124 of the Act provides an alternative route to arbitration for the construction industry. In hearing such grievances, the Board has the authority of an arbitration panel, including the discretion in section 44(6) of the Act to relieve against time limits. While the arbitral jurisprudence on the exercise of that discretion, therefore, is relevant, the Board must also be sensitive to the statutory purpose of section 124, namely, to provide an extraordinarily expeditious mechanism for adjudicating grievances in the construction industry: see, for example, The Lummus Company, supra. Not only may the grievance and arbitration process in the collective agreement be bypassed but, in accordance with section 124(2), the hearing shall be convened within fourteen days after receipt of the application.*

15. In the Board's view, the delay in this case is considerable and not justified. It is accurate to state that the applicant exercised due diligence with respect to pursuing its claims in the courts and that, throughout, Fleming was aware that the applicant was seeking recovery of the alleged overpayment. Further, there may well have been reasonable grounds for extending the time limits in the collective agreement, given the circumstances, had the grievance been filed in October 1984 when the criminal charges were dropped or even in August 1985 following the dismissal of the applicant's civil action. The Board is not indicating that such would have been its decision as the delay was considerable even at those points. In any event, the applicant chose to rely on its rights of appeal within the courts and only when that route was finally exhausted did the applicant seek to invoke section 124 of the Act. Indeed, the applicant waited virtually two months after leave to appeal was refused before filing the grievance. In the Board's opinion, there was no reasonable basis for delay in initiating the grievance process, at the very latest, after August 1985, when the court plainly stated its view that the matter involved the interpretation of a collective agreement and the courts were not the proper forum for that adjudication. Moreover, the applicant acted on legal advice (although not counsel of record in the instant proceedings) in restricting pursuit of its claims to the courts.

16. *The Board, in section 89 complaints, has expressed the view that pursuit of redress in other forums may not constitute reasonable grounds for delay in filing a complaint with the Board: see, for example, Sheller-Globe, supra. The Board regards this admonition as even more compelling with respect to section 124 grievance referrals. The statutory purpose of providing an extraordinarily expeditious mechanism to resolve grievances in the construction industry, because of the nature of the construction industry itself, would be negated by an exercise of the Board's discretion in section 44(6) where a party had full knowledge of the factual basis for its claim and yet chose to exhaust what it regarded as other avenues for redress before filing a section 124 application (cf. The Electrical Power Systems Construction Association, supra). Notwithstanding an arbitral discretion to extend time limits so as to resolve the actual dispute between the parties, there are occasions, as in the instant case, where the benefits of an adjudication on the merits are outweighed by competing policy considerations. Thus, the Board declines to exercise its discretion under section 44(6) of the Act to extend the time limit provided in the collective agreement. There was no dispute that that limit (in article 34.5) had long since passed.*

[emphasis added]

54. We agree with those comments. Given the undue length of the delay, from 8 to 11 months between when the events were known and the grievance filed, and a further 6 months before the instant referral was made, it is incumbent upon the applicant to provide a reasonable explanation for this delay. None has been provided, other than the explanation that the investigation took a "number of months", which we are prepared to infer took the 3 months until Hickey stopped receiving the allowance. The remaining period of delay (without reasonable explanation) therefore totals 14 months: 8 months before the grievance was given to the respondents and the further 6 months between the second step grievance meeting and the filing of the section 124 application. This unexplained delay is of such length that to entertain this application would undercut the purpose of the scheme under section 124 and the need for the quick resolution of such problems in the construction industry. Accordingly, we decline to inquire further into the Hickey grievance and that proceeding is dismissed.

55. The Fougere application will be scheduled for hearing, before the instant panel.

1924-89-U Frank Gates, Complainant v. H. J. Heinz Company of Canada Ltd., United Food and Commercial Workers Union, Local 459, Respondents

Duty of Fair Representation - Unfair Labour Practice - Employer reorganizing work - Reorganization leaving complainant performing work within two different bargaining units - Union representing both units - Union not challenging reorganization and seeking flexibility over work - Union entitled to assess competing interests of bargaining unit members in light of collective agreement - Complaint dismissed

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *J. Trim* and *R. Montague*.

APPEARANCES: *Frank Gates* on his own behalf; *Paul Jarvis* and *Don Cobby* for H. J. Heinz Company of Canada Ltd.; *Timothy G. M. Hadwen* for United Food and Commercial Workers Union, Local 459.

DECISION OF THE BOARD; March 9, 1990

1. The style of cause is hereby amended to reflect the correct name of the respondent: "United Food and Commercial Workers Union, Local 459".
2. The complainant has alleged that the union and the employer have violated sections 66, 68, 69 and 80 of the *Labour Relations Act* (the "Act").
3. The complainant raised three areas of concern. We will review each of these. Generally, the complainant asks to be returned to a timekeeping position with the company.
4. The complainant had returned to work for the respondent company following his two year tenure as president of the union. Normally upon return he would have been placed in his former position. However that position no longer existed as a result of a reorganization. The company advised the complainant that he would return to work in the position of timekeeper. The complainant did not dispute this assignment. His first concern arises as a result of his reassignment to what we will refer to as the labour analyst job. This involves the use of video display terminals. This was a technology with which the complainant was not familiar. Although the complainant disputed any agreement, we are satisfied that there existed an agreement between the union and the company of some ten years standing to the effect that when a temporary vacancy in the labour analyst job occurred the senior timekeeper would be assigned to do that work. The complainant was, at his return, the senior timekeeper. Immediately upon his return however, a vacancy arose in the labour analyst job. The complainant was reassigned to that work in accordance with the aforementioned agreement. The complainant acknowledges that while performing this function for some three and a half months he found it to be very stressful. He acknowledges that the company provided him with training throughout that period. The complainant did not challenge his assignment to the labour analyst job by going to the union or filing a grievance.
5. In or about April 1989, the complainant applied for a temporary posting to the factory office stockroom. He was the successful applicant. It appears he was content to be out of the labour analyst position given that he found it to be very stressful. At that time, the company's stockroom and central stores area were undergoing change. The union has bargaining rights for two bargaining units in the company. The complainant is a member of the factory office and quality control bargaining unit (the "factory office unit"). The position to which he posted was open to employees in that bargaining unit. The central stores area was staffed by members of the plant bargaining unit. The complainant was content to work in the factory office stockroom for some

months. This was in an area physically located on the third floor of the employer's premises. The complainant was also required to work with video display equipment in the stockroom as a result of the company's ongoing computerization. However, unlike the labour analyst job the work was not subject to timeframes and deadlines.

6. Some months later the company continued in its reorganization of its stores areas. The decision was made to combine the factory office stockroom with the central stores area which was located in the basement. This would result in centralizing the company's stores and supplies areas. We are satisfied that the consequence of this reorganization was to move the complainant's work location from the third floor to the basement central stores area, but that his job duties changed very little if at all. The complainant does not seriously challenge that conclusion.

7. It is clear however, that the complainant feels forced into accepting this move and this forms the basis of his second concern. He also feels that the company would not have been able to move him had the union not agreed with the company. He does acknowledge that the company has a right to reorganize its work force and for example to change the lines of supervision.

8. In the course of this change, the company did discuss with the complainant the option of transferring into the plant unit (with his seniority). It seems that the company was of the view that the new position was more appropriately placed in the plant bargaining unit. However it is also clear that the complainant, even while in the factory office stockroom, would distribute supplies on behalf of plant employees. The complainant advised the company that he was not interested in transferring to the plant unit.

9. It must be noted that the complainant is an employee of some thirty-five years service with the company who is now approximately ten months away from retirement.

10. It is the complainant's contention that rather than be "forced" to move to central stores he ought to have been returned to a timekeepers position. We are satisfied however that there was no basis for such a move. The complainant was performing essentially the same job but in a different physical location. There were no vacancies in the timekeeping area or no postings for such positions. Even if the complainant had been able to transfer back to a timekeeping position he would again have been the senior timekeeper. By virtue of that and the long-standing agreement of the company and the union he would have automatically moved to fill vacancies in the labour analyst job which he had found difficult.

11. It was the company's decision to reorganize the stores and stockroom areas. As such the union's action is simply to respond to that decision. The union decided not to challenge the reorganization in any respect. In fact they were of the view that it made sense to centralize the work being performed. Even if the union had chosen to challenge the employer's decision there is no guarantee that the result would have been to return the complainant to the timekeepers function.

12. What the company did as a result of the complainant's dissatisfaction, was to treat him for all purposes as a member of the factory office bargaining unit. He was to report to the supervisor of central stores. A memo dated July 28, 1989 was distributed by Mr. Cobby, Manager of Industrial Relations and Personnel Services. The complainant alleges that by virtue of this memo of July 28, 1989 his seniority rights have been interfered with in a manner that is discriminatory. We disagree. We are satisfied that the complainant was not transferred out of the factory office bargaining unit at his own request. However, as a result of the ongoing reorganization it is clear that he would be performing work that would be considered to be both factory office unit and plant unit work. Other employees working in the central stores area are members of the plant bargaining unit. The memo does for example refer to overtime opportunities. It states that because the com-

plainant is covered by the factory office bargaining unit overtime opportunities must be offered to the plant unit employees first with respect to work in central stores. The memo goes on to say however that if discretion can be used and a policy worked out which would be mutually acceptable to both the plant unit employees and to the complainant, Mr. Cobby would support it. The memo goes on to say that when overtime is required in the factory office stockroom the complainant would have first right to that overtime work. It appears to the panel that the memo is an attempt to equitably balance varying interests in a situation under flux.

13. The complainant's third concern is that he was not offered the opportunity to perform supervisory work on an as needed basis for his then supervisor Mr. Hardy. The complainant asserts that this opportunity is provided to the senior person and that he was senior at the time. Mr. Hardy supervises the individuals performing the labour analyst job and the timekeeping functions. It is a position outside the bargaining unit. There is no contractual obligation to offer this work to the senior bargaining unit member but the company has historically looked to that person first to fill in.

14. In this case, the company determined that it would not be appropriate to have the complainant working in a position where he would be supervising employees performing the labour analyst work which he himself had not performed satisfactorily. The work would involve not only supervision but also work on video display terminals again facing deadlines. The union agreed with the company that the complainant was not qualified to perform this role. The union was also concerned that it not support an unqualified candidate. It wanted to ensure that the opportunity for bargaining unit members to do this work would be retained. Initially, the complainant contended that he ought to have been given the opportunity and been provided training in order to perform the job properly. The company however was of the view that the duration of the vacancy would not warrant training and they were concerned that the complainant had not been able to perform the labour analyst function satisfactorily even with some three and a half months of training. When pressed, the complainant acknowledged that these would be legitimate concerns but stated that as senior employee he ought to have been asked. Had he been asked he asserted, he would not have been unreasonable in his response.

15. In reviewing this summary of the complainant's concerns, we are left to conclude that no violation of the *Labour Relations Act* has been established. There is no conduct alleged which would support a violation of either section 69 or section 80 of the Act.

16. In order to support a violation of section 66(a) of the Act, the actions of the employer must be seen to be motivated in response to the complainant's participation in the union or lawful activity on behalf thereof. There is no such evidence.

17. In order for there to be a violation of section 68 of the Act, the union must have acted in a manner which is arbitrary, discriminatory, or in bad faith in the representation of the employee. The complainant alleges that the union discriminated against him because no one else had been treated as he had. Even assuming that to be true that does not necessarily constitute discrimination in violation of section 68. That section protects employees from discriminatory actions of their union based on improper motive or arising from irrelevant considerations. A union may very well be forced to make choices as between individuals. They may properly be required to treat one individual differently from another depending on the circumstances. It may be that no other individual has been in the same circumstances as the complainant. This does not necessarily arise because of the union's treatment of him. It arises as a result of circumstances in the workplace beyond both the complainant's and the union's control.

18. The complainant was faced with some difficult changes upon his return to work. He

tried to adapt to the new technology in one work area but found it to be very stressful. We note that the timekeeper's job also involves the use of this technology and also involves timeframes and deadlines.

19. In order to deal with this source of stress, the complainant posted to the position in the stockroom. This was a job that he had performed prior to his becoming union president and he was therefore familiar with it. He is able to use the new technology satisfactorily in the stockroom function. Unfortunately, however, with the introduction of technology, this area was undergoing other change. We can see nothing in the reorganization itself or the manner in which it took place that in any way indicates that the company or the union was acting towards the complainant pursuant to any improper motive. At all times it seems that both the company and the union sincerely were trying to address the complainant's concerns. Both the company and the union recognize that the complainant is an employee of considerable service and that he is approaching retirement.

20. With respect to his first concern, he was initially assigned the timekeeper's position but based on what we accept as an established agreement between the company and the union was promoted to the labour analyst job. He did not at the time challenge that reassignment in any respect. The company provided him with training. Notwithstanding, the complainant acknowledges that he was not performing satisfactorily and found that work to be very stressful to him.

21. The changes that the complainant endured which gave rise to his second concern happened as a result of the reorganization of the stockroom and central stores areas. He had chosen to post for that position and was successful. The complainant testified that as a trade unionist he was concerned about the movement of work between bargaining units. However it is clear that even within the factory office stockroom job he was servicing people in the plant unit; work which might otherwise be seen as plant unit work. The union acknowledged that there was overlap in this area as in many other areas in the plant and that it had sought to retain flexibility with respect to the work. Given the complainant's unwillingness to transfer to the plant bargaining unit a compromise was adopted by the company. It allowed him to remain in the factory office bargaining unit although he would report to the central stores supervisor. The union did not collude or conspire in that arrangement. The complainant states that he did file a grievance which he knew to be frivolous. The union was also faced with a grievance from members of the plant bargaining unit challenging what they perceived to be special treatment of the complainant. The role of the union is to honestly assess the competing interests of the members of the bargaining units in light of the terms of the collective agreements to determine the appropriate course of action. There is no evidence to suggest that the union by choosing not to challenge the reorganization of the stockroom and central stores was attempting to "force" the complainant into central stores or into the plant unit.

22. Finally the complainant's third concern is a complaint that he was not asked to fill in for Mr. Hardy when he acknowledges that the company had legitimate reasons for deciding he would not have been an appropriate replacement. Although the company might have met with the complainant to explain why he wasn't being asked, its failure to do so is not a violation of the Act.

23. Therefore, we hereby dismiss this complaint with the additional comments. We are of the view that since the complainant's return to the workplace there have been various breakdowns in communication between the parties. However in and of itself, that does not constitute a violation of the Act. It appears to us that comments made by either the company or the union, however well-intended, were construed by the complainant as patronizing. The complainant emphasized to us that he wanted to engage in useful service with the company until his retirement. He stated at one point that he felt that the company wanted him to resign. However this was not the impression left with the panel whatsoever. To the contrary, the employer made it clear in its submissions that

it does believe that the complainant is providing very useful service to the company and that it has every interest in retaining him as an employee until such time as he retires.

24. Since his return to the workplace the complainant has been subjected to considerable change. Even when successfully accomplished the fact of change can be extremely stressful. In addition, the complainant is about to face an additional change in his working life, that of retirement. This too, simply because it constitutes change, may prove to be difficult. We would encourage the parties and the complainant to put these matters behind them in order to focus on those challenges still ahead.

1213-89-U; 1224-89-U; 1225-89-U; 2034-89-U Prosper Brizzard, Richard Brizzard, Robert Casson, Richard Koski, David Jaggard, Manfred Krause, Robert Krause, David Ross, Aulus Tiitto, Darrell Westover, Raynard Jacobson, Bruce Nordstrom and Larry Jaggard, Complainants v. Wilf McIntyre, Fred Miron, Roland Frayne, Niels Husman, Larry Duhaime and International Woodworkers of America - Canada Local 2693, Respondents; **Gravel and Lake Services Limited**, Applicant v. Roland Frayne, Neils Husman and Larry Duhaime, Respondents; **Gravel and Lake Services Limited**, Applicant v. International Woodworkers of America - Canada Local 2693, Respondent; **Gravel and Lake Services Limited**, Applicant v. International Woodworkers of America - Canada Local 2693, Fred Miron and Wilf McIntyre, Respondents

Final Offer Vote - Strike - Employer alleging union engaging in illegal strike by refusing to sign collective agreement reflecting employer's "final offer" - Union challenging Board's jurisdiction to deal with voter eligibility issues arising out of final offer votes - Union arguing only Minister has this authority - Board asserting jurisdiction - Act silent on disposition of final offer vote issues - Two-step approach of Minister determining vote and Board then determining complaint under Act would result in multiple proceedings and delay - Minister having no adjudicative powers under Act - Board jurisdiction consistent with its adjudicative powers and general structure of Act

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *R. M. Sloan* and *D. Patterson*.

APPEARANCES: *Paul Gordon*, *David Jaggard* and *Darrell Westover* for the complainants in Board File No. 1213-89-U; *F.J.W. Bickford*, *Y. Fricot* and *Paul LeCuyer* for the applicant in Board File Nos. 1224-89-U; 1225-89-U and 2034-89-U; *D. Dubinsky* and *Fred Miron* for the respondents International Woodworkers of America - Canada Local 2693.

DECISION OF THE BOARD; March 5, 1990

1. Ostensibly, these matters are being heard together. However, on agreement of the parties, the Board is first inquiring into the complaint in Board File No. 2034-89-U. Accordingly, it is probably technically more accurate to say that these matters are being heard consecutively.

2. In Board File No. 2034-89-U, the complainant employer alleges that a strike engaged in by its employees is unlawful. This strike began in April 1989. In October 1989, the complainant

requested a "final offer" vote under section 40 of the *Labour Relations Act*. The complainant asserts, in essence, that those of its employees in the bargaining unit represented by the respondent trade union voted to accept its "final offer" and that the respondent trade union has failed to sign a collective agreement reflecting that "final offer", but has instead continued with its strike. The complainant asserts that the respondent's actions constitute unlawful strike activity prohibited by the *Labour Relations Act*.

3. In the course of the second day of hearing, the respondents for the first time challenged the Board's jurisdiction to deal with any voter eligibility questions arising out of the section 40 vote taken in this case. On hearing the representations of the parties, the Board ruled (orally) that it does have the authority to determine, within the context of the complaint before it, the affected bargaining unit and employees in it for purposes of the vote conducted under section 40 of the *Labour Relations Act*. The Board's reasons for so ruling follow.

4. Section 40 of the *Labour Relations Act* provides that:

40.-(1) Before or after the commencement of a strike or lock-out, the employer of the employees in the affected bargaining unit may request that a vote of such employees be taken as to the acceptance or rejection of the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties and the Minister shall, and in the construction industry the Minister may, on such terms as he considers necessary direct that a vote of such employees to accept or reject the offer be held and thereafter no further such request shall be made.

(2) A request for the taking of vote, or the holding of a vote, under subsection (1) does not abridge or extend any time limits or periods provided for in this Act.

The respondents assert that because a vote under section 40 is directed by the Minister upon such terms as the Minister considers necessary, only the Minister can deal with questions involving voter eligibility.

5. Section 40 could be interpreted in the manner suggested by the respondents. The legislature has chosen to stipulate that it is the Minister who has the power to direct the taking of a final offer vote under section 40 and to establish any terms with respect thereto. The legislature could have used the word "Board" in every place where it used the word "Minister". It chose not to do so. We also observe that section 107(1) of the Act permits the Minister to refer certain questions in respect of his powers under sections 16, 44(4) and 45(1) of the Act to the Board (see also section 139 of the Act which enables the Minister to refer certain questions with respect to designations thereunder to the Board). There is no similar provision with respect to section 40. Indeed, there is nothing in the Act which specifically addresses the manner in which issues arising out of an employer's request under section 40 are to be dealt with.

6. Is the Board precluded from inquiring into the conduct and result of a vote held pursuant to section 40? We are unaware of any other case in which the Board's jurisdiction to deal with questions arising out of such a vote, in the context of a complaint or application before it, has been challenged and determined.

7. The Board first considered section 40 of the Act in *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583. There, the Board was faced with complaints from both the employer and the two trade unions involved. The employer's complaint included an allegation that the trade unions had, by failing to abide by and act in accordance with the outcome of the vote (that is, by failing to sign a collective agreement reflecting the "final offer" which had been voted on), failed to bargain in good faith as required by what is now section 15 of the Act.

8. Section 40 does not itself prescribe the consequences which will flow from a vote conducted under it. As an extraordinary procedure which has been injected into the normal collective bargaining process, the consequences of a section 40 vote will depend on the circumstances. In that respect, one must first consider, as the Board did in *Canada Cement Lafarge Ltd.*, *supra*, how section 40 fits into the scheme of the Act and, more specifically, how it interacts with other provisions in the legislation. In *Canada Cement Lafarge Ltd.*, *supra*, for example, the Board considered the effect of a section 40 vote juxtaposed with the duty to bargain in good faith. The Board determined that what consequences flow from a section 40 vote, for purposes of a complaint brought before the Board, will depend on the circumstances surrounding the vote as well as the vote result itself:

8.

We are satisfied that this section is not simply a method by which an employer can sample employee opinion with no legal effect on the trade union. It is our view that the wording of the section makes it abundantly clear that a vote in favour of accepting a last offer creates, in the usual case, the basis upon which a binding agreement between the employer and trade union is to be entered into. When the effect of the vote has been properly recorded in the form of a collective agreement, the officials of the trade union are obligated to execute the document. The failure to execute the agreement may constitute a violation of section [15] which can be remedied by the Board on the filing of a complaint under section [89] of the Act. However, we emphasize the qualification "in the usual case" because there may be circumstances where a trade union would be justified in refusing to submit to the results of a vote. For example, if a vote has been influenced by improper or illegal conduct of an employer, it would be patently silly to conclude that the trade union is violating section [15] by continuing to negotiate and refusing to submit to an outcome that does not represent the true wishes of the employees in the affected bargaining unit. Or a last offer may appeal to the majority of bargaining unit employees and, yet, be in blatant violation of the trade union's duty under section [68] because of the invidious treatment of a minority of employees.

9. A similar but much more difficult situation may arise where the outcome of the vote has been clearly influenced by the segregated ballots cast by a large number of strike replacement employees. If the vast majority of the employees in the bargaining unit who are employed at the commencement of the strike have, however, voted to reject the last offer and to continue their strike, it would be counter-intuitive, in an industrial relations sense, to conclude that the trade union is automatically bound by the wishes of employees it does not really represent. Indeed, the employer's offer in such circumstances might even contain terms which are very damaging to the trade union as an entity, i.e. see *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. July 1136 where an employer's offer contained a demand that the trade union compensate it for losses sustained during a strike. Whether the trade union is obligated to submit to the balloting in these kinds of situations may well depend on the duration of the strike at the time of the vote and other important industrial relations facts. Quite different approaches may also be needed where the employer and trade union have agreed at the outset of negotiations to multi-plant negotiations or other format conditions of bargaining. All of the above, therefore, are useful examples by which to illustrate that a collective agreement need not automatically follow an affirmative vote in a bargaining unit to accept an offer and that section [15] must be applied in light of accepted principles of collective bargaining. As will be elaborated below, the section is intended to end industrial conflict and cannot be used as a vehicle to achieve some destructive aim wholly inconsistent with the overriding purposes of the statute.

13. But with all this talk of "majority" and "minority", it is important to emphasize that section [40] does not itself stipulate that the outcome of a vote is that opinion attracting "more than 50 percent of the ballots cast" as does, for example, section 7(4). In the facts at hand we are prepared to define the outcome in this way because the Minister did not direct otherwise and because there is no industrial relations consideration in this case which would support a definition of the outcome in terms other than a simple majority. In fact, although the International's constitution speaks only in terms of members instead of employees, it too requires a simple majority to ratify a collective agreement. See Article 18, section 3 and see section 63(5) of *The Labour Relations Act*.

15. This then brings us to CCL's section [15] complaint and a consideration of whether the trade union [sic] (International and Local 368) was justified in refusing to execute the tendered collective agreement. What ought the Board's role be in disputes of this kind and, more particularly, what standard of review ought to be applied to pre-vote communications and propaganda, if any? We must also inquire whether the trade union's constitution and the related refusal of approval by the International Vice-President constitute a justification for the trade union's refusal to submit to the outcome of the section [40] vote. Turning to the first issue, CCL's counsel submitted that a "hands-off" policy was the appropriate posture for the Board to take or, at most, the Board's involvement should be limited to obviously unlawful acts or communications. Counsel for the trade union, on the other hand, submitted that the standard of review ought to be as rigorous as that applied in representation elections. It was his submission that, for older employer [sic] with substantial years of service, a threatened plant closing can be every bit as coercive as the kind of conduct that is often censured by this Board in the context of organizing campaigns and representation votes.

16. We are of the view that the Board ought to adopt a position drawing from both of these submissions and that our jurisdiction to do so flows from sections [15] and [89] of *The Labour Relations Act*. The event of a last offer vote has legal significance to both parties in light of their respective rights and duties under section [15]. Such a vote occurs in the context of collective bargaining negotiations and, thus, falls under the Board's general regulatory provisions pertaining to the negotiation process. Presumably, no more specific enforcement provision was thought necessary or wise because of the great variety of situations possible and because of the inevitable inter-relationship of section [15] in all such cases. Section [15] provides:

The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

This section, therefore, constitutes an important vehicle for regulating the conduct of the parties in the context of a section [40] vote as it has assisted in related situations. See *Municipality of Casimer, Jennings, and Appleby, supra*; *Noranda Metals Industries, supra*. We would also observe that the Minister could, in his direction, stipulate certain ground rules for a section [40] vote and rules such as a 48 or 72 hour "silent period" before the vote might well be useful. But clearly, in the absence of Ministerial guidance, this Board cannot take the position that no standard of review is proper. Pre-vote conduct or communications involving coercion, intimidation, threats, or undue influence can undermine the reliability of a directed vote and cannot be tolerated or have been intended. To require the trade union to execute a collective agreement where an employer has engaged in such conduct would simply contribute to the illegality and reward the wrongdoer. On the other hand, the collective bargaining process is that times highly charged with emotion and centres on economic conflict or the threat thereof. In many situations, the very survival of the parties can be at stake and in all instances it embraces an admixture of pressure and persuasion. The complex role of tactic in bargaining through the use of threats, persuasion and public commitment [sic] lies at the centre of the bargaining process. See Schelling *The Strategy of Conflict* (1960); Walton and McKersie, *A Behavioural Theory of Labour Negotiations* (1965); Stevens, *Strategy and Collective Bargaining Negotiations* (1963); Brown, *Interest Arbitration*, Study No. 18, Task Force on Labour Relations (1970); Sanderson, *The Art of Collective Bargaining*, (1979).

Of course, in order to dispose of a matter brought before the Board in which the material circumstances include a section 40 vote, the Board must know what those material circumstances, including the vote result, are. In *Canada Cement Lafarge Ltd., supra*, the result of the vote (i.e., the ballot count) was not a fact in dispute. In the complaint in Board File No. 2034-89-U, both the vote result and the effect it should have are in issue.

9. There were 94 ballots cast in the section 40 vote in question in this proceeding. Of these, 14 were cast in favour of accepting the complainant's "final offer" and 80 were cast against it. However, the right to vote of all but 2 persons who cast ballots has been challenged. Both of the persons who it is agreed were entitled to vote voted to reject the complainant's "final offer". The complainant challenges the right to vote of 77 persons, all of whom voted to reject its "final offer".

The respondents challenge the right to vote of 15 persons who cast ballots, 14 of whom voted to accept the "final offer". Notwithstanding the numerous challenges, all of the ballots were counted and the "results" set out above were released to the parties by the Returning Officer assigned to conduct the vote. The Minister has issued nothing with respect to the "results" of the vote. Nor does it appear that he has any intention of doing so, or that he has been asked to do so by any interested party.

10. We find it neither necessary nor appropriate to determine or comment on what the Minister can or should do with respect to section 40 votes. However, we do observe that the Minister has no authority to adjudicate or determine disputes in which breaches of the *Labour Relations Act* are alleged. Consequently, to adopt the respondent's interpretation of section 40 in this case would effectively require a two step approach to the adjudication of the dispute between the parties (and probably to all complaints under the *Labour Relations Act* which involve issues arising out of the taking and outcome of such votes); that is, at one step the Minister would have to determine the result of the vote, and at the second step, the Board would have to determine the complaint under the *Labour Relations Act* which involves the effect of the results of the vote. This is an undesirable labour relations result since it would, at the very least, result in multiple proceedings and delay in circumstances which require as speedy a resolution as possible. We are mindful of the maxim that labour relations delayed are labour relations defeated and denied (see *Journal Publishing Co. of Ottawa Ltd. et al., v. Ottawa Newspaper Guild, Local 205, OLRB et al.*, March 31, 1977, Ont. C.A., unreported).

11. Further, we have already noted that the Minister, although granted certain powers under the *Labour Relations Act*, is not prescribed any adjudicative role under it. The structure of the Act contemplates that the Board will perform any necessary adjudicative functions and gives the Board the exclusive jurisdiction to determine rights and obligations under the Act. As the administrative tribunal established to adjudicate disputes under the *Labour Relations Act*, the Board is well equipped to adjudicate questions arising out of section 40 votes. It is also consistent with the structure of the Act, having regard to section 40's place in it (see *Canada Cement Lafarge Ltd., supra*, at paragraph 16) for the Board to determine such questions in the course of dealing with matters brought before it.

12. The complaint in Board File No. 2034-89-U alleges that the respondents have failed to abide by the section 40 vote requested by the complainant and have thereby engaged in or encouraged unlawful strike activity, contrary to the *Labour Relations Act*. In order to dispose of the unlawful strike complaint, which is within the Board's exclusive jurisdiction, the Board must first determine the vote result, a matter which is in dispute between the parties. To determine that, the Board must also be in a position to determine the voter eligibility questions which appear to be an issue. Only then can the complaint before the Board be disposed of. It is apparent that the Board must be able to determine questions arising out of the taking of a section 40 vote for the purposes of disposing of matters brought before it.

13. In the result, there is little to recommend the respondent's interpretation of section 40. It would leave the Board without any authority to inquire into questions arising out of a vote taken under that provision. On the other hand, there is, in our view, much to be said in support of an interpretation which permits the Board to do so, at least within the context of a complaint or application which is within its exclusive jurisdiction to dispose of. Consequently, and there being nothing in the legislation which constrained us to come to a different conclusion, we found, and so ruled as aforesaid, that the Board can and will deal with questions concerning the conduct of the section 40 vote requested by the complainant in this case insofar as it is necessary for the Board to do so in order to dispose of the complaint in Board File No. 2034-89-U.

14. The hearings continue.
-

1879-89-R United Steelworkers of America, Applicant v. American Barrick Resources Corporation carrying on business as Holt-McDermott Mine, Respondent v. Group of Employees

Certification - Natural Justice - Practice and Procedure - Board failing to respond to petitioner request for local hearing - Petitioners not attending scheduled hearing in Toronto - Board declining to schedule additional hearing to consider statements of desire - Board posting in workplace gave notice of time and place of scheduled hearing and consequences of failure to appear - Consequences also set out in Board Rules of Procedure - Petitioners not entitled to assume request for change of venue would be granted - Interim certificate issuing

Certification - Evidence - Membership Evidence - Practice and Procedure - Trade union membership evidence lost in mail en route to Board - Union filing photocopies with Form 9 Declaration attesting to rigorous review and confirmation of validity of membership evidence - Board accepting photocopies as meeting requirements of Rules of Procedure - Photocopies backed by Declaration constituting "best evidence" under circumstances - Interim certificate issuing

BEFORE: *R. A. Furness*, Vice-Chair, and Board Members *W. H. Wightman* and *C. McDonald*.

APPEARANCES: *Brian Shell*, *Wes Dowsett* and *Marie Kelly* for the applicant; *Mark Contini*, *John Haflidson*, *Louis Dionne* and *Ron Colquhoun* for the respondent; no one appearing for the objectors.

DECISION OF THE BOARD; March 1, 1990

1. The hearing of this application for certification was heard on November 24, 1989. The hearing was held in Toronto with the applicant and respondent in attendance.
2. This application for certification was filed on November 1, 1989. The terminal date was fixed as November 16, 1989. This panel of the Board heard the application after a Labour Relations Officer had met with the applicant and the respondent. As a result of meeting with the Labour Relations Officer, the applicant and the respondent narrowed their differences, and, after deciding on an issue with respect to membership evidence, the Board was about to release a decision issuing an interim certificate to the applicant together with the appointment of a Labour Relations Officer to inquire into and report to the Board on a number of persons in dispute. Before a decision issued, this panel was informed by the Registrar on November 29, 1989, of the facts set forth in paragraph three.
3. On November 22, 1989, the Board received sixty-eight individual statements in opposition to this application for certification together with an accompanying letter. This material had been mailed by registered mail on November 16, 1989. However, this material which did not refer to any file number of the Board was misfiled within the Board. The named respondent in the application is "American Barrick Resources Corporation" and the correct name of the respondent is "American Barrick Resources Corporation carrying on business as Holt-McDermott Mine". The accompany letter, which referred to "Holt-McDermott Mine", reads as follows:

(Name)
(Address)
(Telephone Number)
Nov. 15/89

The Ontario Labour Relations Board
400 University Avenue
Toronto, Ontario
M7A 1V4

To whom it may concern:

I am writing in regard to a petition, myself and some other concerned employee's (sic) of Holt-Mc Dermott Mine have started.

This petition is to oppose the application made by the United Steel Workers Union.

In less than a week we have gathered this many signatures, some of which had signed a Union card, some others are impartial. Had we had more time probably the majority would be in our favour. Therefore we are requesting that the meeting of Nov. 24th be held in a centre closest to our area as possible.

Hopefully, with this many signatures, we feel that another vote would be fair.

Hope to hear from you soon.

Sincerely,

(Name)
(Signature)

4. The Registrar was not aware of the existence of this material until November 29, 1989, and consequently was not able to communicate to the representative of the objectors prior to the scheduled hearing on November 24, 1989. On November 29, 1989, the Registrar acknowledged the receipt of the material from the objectors and also advised the applicant and the respondent of the same.

5. On January 3, 1990, the Registrar received the following letter from counsel for the applicant:

**Re: United Steelworkers of America and American Barrick Resources Corporation;
Application for Certification; Board File: 1879-89-R; Our File: OLRB-868**

I acknowledge receipt of your letter dated November 29, 1989 advising of receipt of a typewritten letter dated November 15, 1989 and Statements of Desire enclosed therewith.

I confirm your telephone advice that the Board wishes to receive the comments of the United Steelworkers of America with respect to the above-captioned letter from you with enclosures.

This application for certification was heard before the Board on November 24, 1989 and before Board Officer Reilly immediately following the formal hearing before the Board which dealt with an evidentiary matter in this file.

The applicant forwarded the "Notice of Posting" card to the Board advising the Board that the "Notice to Employees (Form 6)" was posted by the employer on November 9, 1989, seven days before the terminal date set by the Board and 13 days before the scheduled hearing date of November 24, 1989.

As the Board knows, no one appeared before the Board on November 24, 1989 on behalf of any objecting employee or group of objecting employees and no one joined the meeting with Board

Officer Reilly on November 24, 1989 on behalf of any objecting employee or group of employees.

The "Notice to Employees (Form 6)" referred to above provides in paragraph 5 thereof as follows:

IF YOU DO NOT ATTEND AT THE HEARING THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE OF THE PROCEEDING.

With respect to the cover letter dated November 15, 1989 from an objecting employee which appears to request a change of venue, I advise that I did not receive any such request or have any knowledge of any such request until the receipt of the material from the Board, more than one week after the hearing date.

It is respectfully submitted that where objecting employees have received notice of the application for certification, notice of the terminal date, notice of the hearing date, and have been cautioned in the terms set forth above from paragraph 5 of Form 6, such employees have no further rights where they do not attend before the Board on the scheduled hearing date. A request to change the venue, *which was not granted by the Board*, does not mean that the objecting employees escape the consequences of their failure to attend at the Board on the scheduled hearing date. (Emphasis in letter).

In addition, it is respectfully submitted that the applicant committed itself to positions with respect to Schedules A, B, C & D in the meeting with Board Officer Reilly on the basis that there was not a numerically relevant Statement of Desire objecting to the applicant's application for certification in circumstances which included the fact that no one attended at the Board to speak to any such statement of desire.

Moreover, the applicant and respondent consented to the Board issuing a decision without a further hearing before a panel of the Board. The applicant and the respondent executed an "Application for Certification Waiver of Hearing" specifically consenting to the Board issuing a decision based upon the submissions made and the agreements reached without a further hearing before a panel of the Board. In this regard, the applicant submits that it is prejudiced if the Board does not consider the application for certification based upon the "Meeting with a Board Officer Report" and the "Application for Certification Waiver of Hearing", both of which are signed by the parties who attended before the Board on November 24, 1989, and the submissions before the panel on the hearing date.

It is respectfully submitted that the objecting employees have no standing before the Board following their failure to attend on the scheduled hearing date. Any departure from this well-established principle would interfere with the Tribunal's ability to provide finality to an application for certification or any other proceeding.

The applicant relies upon Rules 73(5) and 80(2) of the Board's Rules. These provisions make it clear that where a person is informed of the hearing *by posting* and fails to appear at the hearing, the Board is entitled to deal with the matter without further notice to the person and without considering any statement filed by him. Where such statement has been filed on or before the terminal date, the failure to appear on the hearing date makes the statement of desire irrelevant. (Emphasis in letter).

The Board has held in numerous cases (see, for example, *Intercity News Co. Ltd.* [1981] OLRB Rep. Feb. 171) that it will give no effect to a statement of desire where the petitioners have failed to appear and give first hand evidence regarding the petition. Furthermore, the Board has refused to grant an adjournment of a scheduled hearing where a party fails to attend. (See, for example, *Russel McVicar Ltd.* [1980] OLRB Rep. July 1049).

I also observe that I am not in receipt of any correspondence from any representative of any objecting employee or group of objecting employees.

I respectfully submit that there is not any basis for any further delay in the Board's determina-

tion of the application for certification based upon the material filed, the agreements reached with Board officer Reilly and the evidence and submissions made to the Board on November 24, 1989.

6. On, January 4, 1990, the Registrar received the following letter from counsel for the respondent:

Re: United Steelworkers of America and America Barrick Resources Corporation

Board File No. 1879-89-R

We have been invited to make submissions as to the appropriate manner of dealing with 68 identical statements of desire enclosed with a letter dated November 15, 1989 which have been received by the Board.

At the outset, we would note that all of the facts relevant to these submissions are not fully clear to us. As a result, it is necessary to make certain assumptions.

First of all, we assume that the letter enclosing the statements of desire was sent by registered mail and was so sent on or before the terminal date of November 16, 1989, in accordance with the Board's requirements. Secondly, as would appear from the stamp on the copy of the letter we have received, we assume that the November 15 letter was received by the Board on November 22, 1989 at 2:00 p.m. We further assume that no attempt to contact the objecting employee to respond to the request made in the letter to have the hearing held in the centre closest to the mine area was made by the Board between the time of receipt of the letter and the time of the hearing.

If the assumptions noted above are correct, it is our submission that full consideration should now be given to the statements of desire that have now been filed. We note the provisions of section 75(1)(b) of the Board's Rules of Procedure:

"75(1) Where a document is required to be filed by these Rules, filing shall be deemed to be made,

• • •

(b) where it is mailed by registered mail addressed to the Board at its office at 400 University Avenue, Toronto, Ontario M7A 1V4, at the time it is mailed."

In accordance with this provision, the statements of desire in this case are deemed to have been filed with the Board on or before the terminal date. As a result, they are timely and accord with the requirements of section 73(3) of the Board's Rules of Procedure. Therefore, they merit full consideration by the Board.

We acknowledge that the Form 6, Notice to Employees of Application for Certification and of Hearing, advises that objecting employees or their representatives must attend the Board's hearing if their objection is to be considered and in this case no objecting employee or representative appeared at the November 24th hearing. However, we note that a specific request was made in the letter of November 15, 1989 sent to the Board by the objecting employee, asking that the hearing be moved to the closest possible centre to the area of the mine. The letter ends with the hope that the Board will provide a response. Under these circumstances, we submit it was reasonable for the objecting employees to anticipate further advice from the Board in respect of when and where the hearing would take place. As indicated, we assume no such further advice was received. We submit that it was reasonable for the objecting employees to assume that the hearing would not simply proceed in line with the original notification provided in the Form 6 without further contact and advice from the Board as to hearing arrangements.

As indicated above, it would appear that the letter of November 15, 1989 was received by the Board on November 22, 1989 at 2:00 p.m. There was ample opportunity for the Board to contact the objecting employees after this time to confirm hearing arrangements before November

24th. Given the content of the letter from the objecting employee, we submit that the appropriate course of action for the Board to follow was to make such contact with the objecting employees. However, as indicated, we assume that no attempt to contact them was undertaken by the Board.

We note that the provisions of section 73(5) of the Board's Rules of Procedure are not mandatory. The Board has the discretion to consider the statements of desire that have been filed in this case notwithstanding the failure of the objecting employees to appear at the hearing. In all of the circumstances as outlined above, the failure of the objecting employees to appear on the 24th should be regarded as excusable and the Board's discretion should be exercised in favour of a full consideration of their objection in accordance with the Board's practice.

By way of conclusion, we would note that there are always uncertainties concerning the true wishes of employees which are inherent in applications for certification, given the nature of membership evidence that is submitted. In this case, there is an additional element of uncertainty presented by the fact that all of the membership evidence that has been submitted is in the form of photocopies. In these circumstances, we submit that it is especially important that all possible steps be taken to ensure the best possible assessment of the true wishes of the employees affected by the application. This in our submission, necessarily requires that the statements of desire that have been filed be given full consideration by the Board.

Thank you for the opportunity of making these submissions.

7. On January 15, 1990, the Registrar received the following letter from counsel for the applicant:

Re: United Steelworkers of America and American Barrick Resources Corporation; Application for Certification; Board File: 1879-89-R; Our File: OLRB-868

I acknowledge receipt of a copy of a letter from the respondent to the Board in the above-captioned matter, dated January 4, 1990. I set forth below our representations in response to the respondent's letter.

The respondent states that since the statements of desire were received by the Board in a timely fashion (an assumption made by the respondent and the applicant in their submissions to the Board) "they merit full consideration by the Board". The applicant reiterates and relies upon the decision set forth in its letter to the Board dated January 3, 1990 (*Intercity News Co. Ltd.*) [1981] OLRB Rep. Feb. 171 and the cases following it which hold that the Board will give no effect to a statement of desire where firsthand evidence is not given in support of the petition on the hearing date. Therefore, the respondent's proposition that because the petitions were received in a timely manner they should be considered by the Board has not been accepted by the Board in the past.

The respondent states that it was reasonable for the objecting employees to assume that the hearing would not proceed on November 24. The applicant takes the position that such conclusion is not reasonable in view of the express caution contained on the Form 6 which was posted at the employer's premises prior to the terminal date in this matter. The respondent suggests that it was reasonable for the objecting employees to anticipate that they would hear from the Board with respect to the scheduling of the hearing and that it was "appropriate" for the Board to contact the objecting employees to advise them of whether or not the hearing would proceed on November 24, 1989. If the Board accepts the respondent's suggestions that the Board must contact objecting employees who have requested a change of venue and confirm with them whether or not the hearing will be proceeding on the date schedule, a cumbersome administrative and scheduling procedure will be established. If the Board is required in every case where a request is received prior to the first scheduled hearing date to confirm with the party who has made the request whether or not their request is granted, many difficulties may arise, particularly with respect to objecting employees. What if, for example the objecting employee who has requested a change of venue or an adjournment has not set forth his telephone number on the

correspondence, or what if the objecting employee who has requested a change of venue or an adjournment is not reached by the Board regardless of attempts to contact him?

The applicant has taken the position throughout this matter that the fact that the membership evidence submitted in support of this application was photocopied does not reduce the value of such evidence in before the Board. The applicant disagrees with the respondent's assertion that there is an "additional element of uncertainty" which arises from the fact that photocopied membership cards were relied upon by the applicant before the Board. This factor is irrelevant to the Board's determination of whether or not the statement of desire should be considered.

Thank you for your attention to this matter.

8. On January 22, 1990, the Registrar received the following letter from counsel for the respondent:

Re: United Steelworkers of America and American Barrick Resources Corporation

Board File No. 1879-89-R

We acknowledge receipt of a copy of a letter from Counsel for the Applicant dated January 3, 1990 with respect to the matter above noted. Further to your invitation, following is our response thereto.

The Applicant's primary submission is that the failure of the objecting employees to attend at the November 24th hearing renders the statement of desire irrelevant and is fatal to any further rights the objecting employees might have. Reliance is placed on sections 73(5) and 80(2) of the Board's Rules of Procedure in support of this proposition.

The Respondent notes that the provisions of section 73(5) and 80(2) of the Board's Rules are not mandatory. The objecting employees' failure to appear does not automatically render the statement of desire irrelevant. The Board has the discretion to consider the statement, notwithstanding the failure to appear. In all of the circumstances obtaining in this case, it is submitted that the Board's discretion should be exercised in favour of consideration of the statement of desire. We note that a specific request was made in the letter of November 15th sent to the Board by an objecting employee for a change in venue for the hearing. It was reasonable for the objecting employees, who do not appear to have been represented by counsel to assume that a response to their request would be provided before the hearing proceeded.

Counsel for the Applicant also makes the point that "[a] request to change the venue, *which was not granted by the Board*, does not mean that the objecting employees escape the consequences of their failure to attend at the Board on the scheduled hearing date." In response to this point, we would note that this is not a case where the objecting employees' request for a venue change was refused, following which the objecting employees chose not to appear. In such circumstances, there may well be merit in disposing of an application without further consideration of the position of the objecting employees. However, such are not the circumstances that obtain here. As indicated in our letter of January 4, 1990, we assume that the objecting employees in this case were not contacted at all with respect to their request. In fact, we assume that no attempt was made by the Board to contact them to respond to their request. In these circumstances, there *is* merit in the exercise of discretion in favour of a consideration of the statement of desire. (Emphasis in letter).

Counsel for the Applicant also makes reference to the fact that the Applicant committed itself to positions at the meeting with Board Officer Reilly on the basis that there was no relevant statement of desire, and that both the Applicant and the Respondent consented to the Board issuing a decision without further hearing through execution of the Waiver of Hearing form at that time. The Applicant submits that it is prejudiced if the Board now considers the statement of desire after these positions have been taken and the Waiver of Hearing executed. In response to these concerns, we simply note that any possible prejudice to the Applicant and the Respondent can easily be remedied. Both parties took positions and agreed to a waiver on the basis of a mistaken set of facts and circumstances. As a result, the waiver can and should be set aside, and

the parties should be permitted to reassess their positions in light of the true facts and circumstances that apply. This would eliminate any possible prejudice that might otherwise result.

By way of conclusion, we note that the Counsel for the Applicant suggests that any consideration of a statement of desire under these circumstances would interfere with the Board's "ability to provide finality to an application for certification or any other proceeding". While we agree that a concern with providing finality is an important consideration for the Board in an application such as this, it is more important that such finality not be achieved at the expense of making a decision that may not reflect the true wishes of the parties affected. As we have already noted, if our submissions made at the hearing on November 24th for a dismissal of the application for certification are rejected, there are already additional elements of uncertainty presented in such application by the fact that the membership evidence is in the form of photocopies. To issue a decision without consideration of the statement of desire simply adds to the uncertainty, and takes it to what we submit is an unacceptable level. Finality should not be achieved at so high a cost.

For all of these reasons, we again submit that the Board's discretion in this case should be exercised in favour of consideration of the statement of desire.

8. On January 26, 1990, the Registrar received the following letter dated January 19, 1990, from the representative of the objectors:

(Name)
(Address)
(Telephone Number)

January 19/90

Re: United Steelworkers of America and American Barrick Resources Corporation.

Board File No.: 1879-89-R

I acknowledge receipt of your letter dated Jan. 09/90. As per the comments concerning this matter. I didn't appear before the board on Nov. 24th on behalf of the concerned employee's objecting to oppose the application of the United Steel Workers Union of America, due to the fact that I was not contacted or made aware that I or other concerned employees should have been at that meeting.

We had to start somewhere, when this all began (the opposition) not being familiar with procedures of any kind, I contacted the Labour Relations Board, at which time the only thing I was told was to get a petition signed, there was no mention of dating such or anything else. So I went ahead just as I was explained and did just that, and to mail them which I did on time. Also enclosed was a letter requesting that if there was a meeting could it be held at a centre close to our area, and hoping to hear from you soon.

However, I received no contact by the board. And a meeting took place as planned. I only received a letter from the board dated November 29th 1989 of receiving 68 statements to oppose but only after the meeting was held. To this date we still feel very strongly that a Union is unnecessary, and in discussing this with the concerned employee's (sic) it's a waste of money all around.

We may be miners but we hope our concerns counts for something. Hopefully will hear from you soon.

(Name)

(Signature)

9. On February 8, 1990, the Registrar received the following letter from counsel for the respondent:

Re: Unit
ed Steelworkers of America, and American Barrick Resources Corporation

Board File No. 1879-89-R

We are in receipt of the Board's correspondence enclosing a copy of a letter dated January 19, 1990 from an objecting employee, and inviting comments in respect of such letter.

We wish to point out that the January 19, 1990 letter appears to confirm the assumptions that were made in our submissions to the Board dated January 4, 1990. Particularly, it would appear that a Statement of Desire was filed in timely fashion, along with a letter requesting a change in venue for the hearing. Further, it would appear that the objecting employees expected a response to their request before the hearing actually proceeded, but were not contacted by the Board in this regard.

As indicated in our submissions of January 4, 1990, it is our position that it was reasonable for the objecting employees to assume that further contact would be made by the Board prior to the hearing taking place, especially in light of the fact that the objecting employees appear to be unrepresented by counsel familiar with the Board's procedures. We submit that in these circumstances the Board's discretion should be exercised in favour of a consideration of the Statement of Desire.

As we have noted, there are potentially significant levels of uncertainty presented in this application by the fact that the membership evidence is in the form of photocopies. To fail to consider the apparent wishes of such a large number of objecting employees would further compound the problems of uncertainty. We would submit that these problems are best resolved by a secret ballot vote amongst all employees affected by the application. At the very least, full consideration should be given to the Statement of Desire before any decision on the application is made.

10. On February 12, 1990, the Registrar received the following letter from counsel for the applicant:

Re: United Steelworkers of America and American Barrick Resources Corporation;

Board File: 1879-89-R; Our File: OLRB-868

We have received from your office a copy of a letter dated January 19, 1990, respecting the above captioned matter. You requested submissions by February 9, 1990. Jim Bowman of your office granted our request for an extension of the due date for submissions until today's date.

The Applicant maintains its objection to the Board's consideration of the petition in this matter. The Applicant reiterates and relies upon the representations set forth in its letters dated January 3, 1990 and January 15, 1990. If the Board intends to enquire into the voluntariness of the petition based upon the statements contained in the letter of January 19, 1990, particularly the representation that the letter writer and other concerned employees were unaware that they should have been at the first scheduled hearing date of November 24, 1989, the Applicant respectfully request that the Board convene a hearing. The Applicant will call evidence respecting, inter alia, the issue of whether or not the petitioners were aware that they should have attended at the Board on November 24, 1989.

Thank you for your attention to this matter.

11. The Board has considered the representations before it. The representative of the objectors clearly had notice of the hearing date of this application for certification. This hearing date was set forth in Form 6, Notice to Employees of Application for Certification and of Hearing in paragraph two thereof. Paragraph 5 of Form 6 sets forth the consequences of failure to attend the hearing and states:

5. IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

Sections 73(5) and 80(2) of the Board's Rules of Procedure state as follows:

73(5) The Board may dispose of the application without considering the statement of desire of any employees who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witness as to,

- (a) the circumstances concerning the origination of the statement of desire; and
- (b) the manner in which each signature on the statement of desire was obtained.

80(2) Where a person is served with a notice of hearing by the registrar or is informed of the hearing by posting and fails to appear at the hearing, the Board may dispose of the application or complaint without further notice to the person and without considering any statement filed by him.

12. There is no doubt that the representative of the objectors had knowledge of the time and place of the scheduled hearing. The consequences of not attending the hearing are clearly set forth both in Form 6 and in sections 73(5) and 80(2) of the Board's Rules of Procedure. There is, however, a written request before the Board for a change in venue of the scheduled hearing to a place more convenient to the objectors. Due to an administrative problem, this written request was unfortunately not brought to the attention of the Registrar until after the scheduled hearing had been held in Toronto. The Board does not agree with the proposition that in these circumstances it is reasonable for the objectors to assume that the scheduled hearing would not proceed as provided in Form 6 without further contact and advice from the Registrar. If the Board were to accept this proposition it would mean that, if any party to a proceeding merely sent in a request to adjourn or change the venue of a hearing, such a party could safely assume that its request would be complied with regardless of the ability of the Board to act upon such a request or the willingness of any other party or parties to consent to such a request. The Board would be severely restricted in the scheduling of cases and in its administrative operations generally.

13. The arguments before the Board raise issues of fairness to all parties and the efficacy and integrity of the Board's procedures in the light of the circumstances of this application for certification. In *Russell MacVicar Limited*, [1980] OLRB Rep. July 1049, the Board stated at page 1053:

6. ... [It] is well established that a mistake by a party or its counsel, which results in a failure to attend a Board hearing is not a ground requiring reconsideration of a Board decision or a rehearing of the original matter. (See *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320; *Soo Dairies Ltd.*, [1968] OLRB Rep. Mar. 1183). One of the principal purposes of an administrative agency is to process the matters that come before it with expedition and economy. This value can only be achieved if there is finality to the Board's decisions in the vast majority of cases. To rehear cases because one party made a mistake and neglected to attend a hearing would substantially impair this end. This is especially the case, where, as here, there has been clear notice and explicit instructions from a solicitor that the respondent should appear.

Failure to appear at a hearing where counsel for objecting employees made an erroneous assumption that he would receive a second notice of hearing from the Board caused the Board to dismiss a request for reconsideration of an application for certification. See *Soo Dairies Limited*, [1968] OLRB Rep. April 115.

14. A recent case of the Board dealt with a situation where counsel had made a mistaken

assumption based upon a telephone conversation with the Registrar and failed to attend a scheduled hearing. In *The Corporation of the City of Sault Ste. Marie*, [1987] OLRB Rep. Oct. 1319, the Board stated at page 1329:

13. Counsel for the respondent admits a mistaken assumption and states that simple fairness is required. The concept of simple fairness is more than a subjective assessment of the consequences of a false assumption and the feelings of a client who is "quite upset". The concept of simple fairness must surely be an objective assessment of all the circumstances such as the reasonable and legitimate expectations of the applicant and intervener #2 under the administration of the *Labour Relations Act*. The applicant and intervener #2 commenced proceedings under the *Labour Relations Act* and attended a scheduled hearing in order to obtain the remedies they sought. In labour relations, time is of the essence. ...

14. It appears to the Board that an error based upon an unwarranted and false assumption by counsel for the respondent led to the failure of counsel to attend before the Board on August 6, 1987. As the Board held in *Addressograph-Multigraph of Canada Limited*, [1968] OLRB Rep. March 1183, counsel's responsibilities are no less onerous than the responsibilities imposed on a party in any proceedings and a party cannot evade the results of mistakes made by counsel retained by a party. The Board has made its decision after a hearing held after sufficient and adequate notice to all parties of such hearing. The Board is not prepared to reconsider its decision in this matter. The absence of counsel through his own false assumptions is not a ground for reconsidering a decision of the Board pursuant to section 106(1) of the *Labour Relations Act*. The Board notes that the respondent has not alleged that it had new evidence which could not previously have been obtained by reasonable diligence and that such evidence, if adduced, would be practically conclusive as contemplated in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320.

An application for judicial review was dismissed by the Divisional Court and leave to appeal was denied.

In the instant application, there was apparently also a mistaken assumption which arose wholly in the mind of the representative of the objectors without any intervention by the Board. The position of the representative of the objectors is no higher than the position of counsel. The applicant and the respondent attended the hearing before the Board and conducted themselves, made representations and adopted positions with respect to the composition of the bargaining unit based upon the state of affairs made known to them at the hearing. As the Board stated in *The Corporation of the City of Sault Ste. Marie*, consideration of fairness requires an objective assessment of all the circumstances. In the instant case, the applicant and the respondent attended the scheduled hearing. The representative of the objectors who also received notice of the scheduled hearing elected not to attend apparently based upon a mistaken assumption which was of his own making. In these circumstances, the Board proceeds to entertain this application for certification and is not prepared to schedule a hearing in order to consider the statements in opposition to this application. The statements in opposition are accordingly dismissed.

15. The name of the respondent is amended to read: "American Barrick Resources Corporation carrying on business as Holt-McDermott Mine".

16. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

17. Having regard to the agreement of the applicant and the respondent, the Board further finds that all employees of the respondent in Holloway Township, save and except forepersons/supervisors, persons above the rank of foreperson/supervisor, office, clerical, sales and technical employees and students employed during the school vacation period, constitute a unit of employees appropriate for collective bargaining.

18. The evidence of membership, which was filed by the applicant on or prior to the terminal date set by the Board, consisted of photocopies of the membership cards. Counsel for the applicant advised counsel for the respondent of this state of affairs in a letter dated November 22, 1989, which was faxed on that date. The hearing in this matter was held on November 24, 1989. Counsel for the applicant presented the facts surrounding the events which led to the filing with the Board of photocopies of the membership evidence rather than the original membership evidence. Counsel for the applicant informed the Board that he had witnesses present who were able to give evidence with respect to the facts which he presented to the Board. Formal proof of the facts asserted by counsel for the applicant was not necessary because counsel for the respondent accepted the assertions by counsel for the applicant as being the relevant facts with respect to the circumstances under which the photocopies of the evidence of membership came to be filed with the Board. Counsel for the respondent did not call any evidence in this regard. The Board therefore proceeded on the basis of an agreed statement of facts which is set forth in the next paragraph.

19. The applicant filed photocopies of the evidence of membership on or before the terminal date of this application for certification with respect to those persons who made application to join the applicant. The original evidence of membership consisted of individual membership cards which were packaged and forwarded together with a binder. In the binder were photocopies of the evidence of membership. This material was forwarded from Kirkland Lake to the Legal Department of the applicant by priority post. The envelope which was used was a brown paper padded envelope such as might be used to send a book through the mails. The envelope was closed by means of staples and was received in Mr. Shell's office on November 7, 1989. Mr. Shell's secretary recalls that upon receipt the envelope was taped. The envelope had been opened by pull string and its contents were removed. The membership cards were not in the envelope. The envelope had been packed in Kirkland Lake with membership cards and photocopies of the membership evidence by Wes Dowsett personally. The photocopies of the membership evidence which were placed in the package by Mr. Dowsett who is a casual employee of the applicant and who works as an organizer. The envelope had been forwarded to the applicant so that the membership cards could be filed with the Board on or before the terminal date of November 16. The applicant has searched and checked and concludes that the membership cards have been lost. Mr. Dowsett has reconstructed the package by placing the same number of other membership cards therein and has ascertained that the package weighed the same as when it was initially mailed. The stapled envelope had been opened accidentally or otherwise and was resealed by the Post Office. The applicant discovered that the membership cards were missing on November 10 and on November 12 learned with certainty that none of its personnel had the membership cards. The applicant filed photocopies of the membership cards on or before the terminal date and advised the Board that it did not rely upon the membership evidence with respect to one person. The applicant engaged in a strenuous Form 9 inquiry and as an appendix to Form 9, Declaration Concerning Membership Documents, disclosed as follows:

APPENDIX "A"

The membership evidence submitted in support of the application for certification consists of photocopies of individual applications for membership to the United Steelworkers of America. The applicant hereby confirms that each of the collectors of the memberships for application has confirmed the authenticity and validity of each document filed in support of membership in the Steelworkers and that has been filed in support of the application for certification.

In submitting this Form 9 Declaration and Appendix the applicant notes that because of exceptional circumstances (see cover letter) it must rely upon the photocopies of membership evidence. Accordingly, the applicant has undertaken an exceptionally rigorous review and confirmation of the validity of the membership evidence in support of the application for certification.

The applicant is prepared to bring evidence as to why it is relying upon the photocopied membership evidence in this case.

With regard to the membership evidence filed on behalf of:

1. (Name), the applicant states that the correct date of signing for request of membership in the applicant, payment of the \$1.00 and collection of the \$1.00 is August 30, 1989.
2. (Name), the applicant states that the correct date of signing for request of membership in the applicant, payment of the \$1.00 and collection of the \$1.00 is September 1, 1989.

As a result of not being able to ascertain who collected one card, the applicant asked that it not be relied upon. The membership cards have been lost. This loss is not due to any negligence by the applicant. On November 14, the applicant filed an Application for Indemnity or Service Inquiry with Canada Post Corporation. Such an application initiates a trace internally for the contents of the package. However, the applicant has not received an official response from Canada Post Corporation.

20. The applicant argued that the Board ought to accept the membership cards in the form of photocopies since the membership cards in this form had been filed with the Board on or before the terminal date together with a Form 9, Declaration Concerning Membership Documents with a full disclosure of the circumstances. The applicant further argued that the membership cards in the form of photocopies ought to be accepted by the Board because the Board could be satisfied that a majority of persons in the bargaining unit have requested membership in the applicant and have paid one dollar. It was the position of the applicant that while membership cards filed with the Board normally bear fresh ink, the Board has quite properly accepted membership cards in the form of photocopies. The applicant also adopted the position that the Board should not inquire further to see the colour of the fresh ink where the applicant had raised the matter before the Board and counsel for the respondent and had disclosed the circumstances in Form 9. It was argued by the applicant that whether the Board received an original membership card completed in blue ink or a photocopy which indicated black ink the Board was still in timely possession of and ought to accept either version since both versions were documentary hearsay. The applicant emphasized that inquiries made pursuant to Form 9 confirmed the payment of one dollar to the collector shown thereon.

21. The respondent informed the Board that it was prepared to accept the facts as recited by counsel for the applicant including the Form 9, Declaration Concerning Membership Documents. The respondent adopted the position that the Board ought not to accept the membership evidence in the form filed by the applicant. The respondent argued that section 73(1) and (2) of the Board's Rules of Procedure provided a statutory obstacle to the acceptance of the membership evidence in the form filed by the applicant. Section 73(1) and (2) provide as follows:

73.-(1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or a signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

- (a) is accompanied by,
 - (i) the return mailing address of the person who files the evidence, objection or signification, and

(ii) the name of the employer; and

(b) is filed not later than the terminal date for the application.

(2) No oral evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).

The respondent argued that the Board was required to give effect to the mandatory provision which required that the Board not accept evidence unless it is in writing and signed by the employee. The respondent further argued that oral evidence of membership could not be accepted except to substantiate the written evidence of membership and that the applicant could not cure an irregularity. A series of photocopies could not be regarded as being signed by persons who were held out as supporting the applicant. It was the view of the respondent that the applicant should be required to have membership cards signed again. The respondent also argued that the difference between originals and photocopies was more than a mere difference in the colour of the ink. It was the view of the respondent that the usual comparison of signatures between those appearing on membership cards and specimen signatures could not be undertaken with the same degree of confidence where the original membership cards are not present. It was also the view of the respondent that with photocopies it was possible to hide or change information by employing "white out", such as, for example, the changing of a date on a membership card by an organizer. The respondent reasoned that since the Board exacts the highest standards with respect to membership evidence it should require the highest standards of integrity and be vigilant to see that there were no additional irregularities which could occur when photocopies are relied on rather than original documents.

22. The Board has previously considered applications for certification where an applicant did not file membership evidence in its original form. In *Praetor Enterprises Limited*, [1983] OLRB Rep. Apr. 592, the Board listed an application for hearing and stated that the purpose of the hearing was as follows:

Applications made pursuant to the construction industry provisions of the *Labour Relations Act* normally do not require that a hearing be held by the Board. In the present instance, the Board has not received the evidence of representation in support of this application nor has it received a Form 80 as required by the Board's Rules of Procedure. The position taken by the applicant trade union is that prior to the terminal date, the evidence of membership and the Form 80 were sent by registered mail to the Board. The Board has not yet received these documents. In these circumstances, the Board directs that the Registrar list this matter for hearing. At the hearing in this matter, the Board will hear *viva voce* the evidence of the applicant trade union concerning the mailing by registered mail of the evidence of membership and the Form 80. The Board will then base its decision in this application for certification on that evidence.

At the hearing a business representative of the applicant gave evidence that he handled the application for certification and that he mailed by registered mail to the Registrar an envelope containing certain membership documents and a Form 80, Declaration Concerning Membership Documents, Construction Industry. In support of this statement he presented a registration receipt from Canada Post for March 28, the date on which he mailed the letter, listing amongst other things, a letter sent by registered mail to the Registrar. The business representative also filed with the Board photocopies of five membership documents enclosed in the envelope. The business representative testified that the applicant had instituted a search with Canada Post on April 12. As of the date of hearing, the search had revealed nothing further about the missing envelope. The Board accepted the evidence of the business representative that the documents referred to were mailed by registered mail prior to the terminal date of the application. The Board specifically found that the appli-

cant had filed and recited the details of the membership evidence as set forth on the photocopies. In *The Norfolk County Board of Education*, [1974] OLRB Rep. March 182, the Board commented upon a situation where photocopies of membership evidence were filed without being disclosed in advance. At pages 183 and 184, the Board stated as follows:

4. The Board has examined with some concern the evidence of membership filed by the applicant in support of its claim for bargaining rights. They are photocopies of documents that purport to indicate that the undersigned in each case is an office employee in the employ of the respondent, that each is a member of the applicant trade union, and that the required initiation fee was paid. Save in two circumstances, the signatures purport to reflect copies of the counter-signature of the treasurer of the applicant and a date appears on each of the documents described herein. In the case of two documents, the signature of the treasurer seems to have been penned in after the photocopies were taken.

5. The Board usually relies on the "best evidence" in accepting documents indicating the voluntary wishes of employees to be members of a trade union. The Board relies heavily on such evidence and normally accepts documents indicating membership in a trade union at face value. In this regard such reliance is usually predicated upon the filing of the authentic, original membership cards. The Board imposes such strict standards with respect to the acceptability of such evidence in order to avoid the onerous task of requiring oral testimony of each and every person who purports to be a member of a trade union pursuant to an application for certification. In short, the practice of the Board in satisfying itself of the true and voluntary wishes of employees who desire to be members of a trade union is to rely on "the best evidence" available.

6. The hazard of accepting photocopy evidence is indicated in the two instances referred to in paragraph #4 herein. In those instances, the signature of the treasurer is handwritten on two cards. That is to say, in those examples the photocopies are not a true replica of the original cards. It is noted that this matter was not disclosed in the Form 8 [now Form 9], Declaration Concerning Membership Documents. It follows, therefore, that for the Board to accept the membership evidence filed by the applicant we would have to condone an obvious (whether intended or not) misrepresentation. The Board, therefore, does not hesitate to set aside all of the applicant's evidence of membership.

7. In order that the Board's decision be not misunderstood, it wishes to add the following for the applicant's benefit. The Board, in most circumstances, will require that documents purporting to be membership cards be filed in their original form. Nevertheless, there may very well be circumstances where photocopy evidence may be the only evidence available for purposes of establishing a claim to representative rights. In such instances, the Board is of the opinion that the matter of the photocopy evidence should be disclosed in advance and that the applicant be prepared, at the hearing, to establish the authenticity of such evidence.

8. The application is therefore dismissed.

23. In the instant application, the applicant seeks to rely on the best evidence available and has adopted the advice of the Board set forth in *The Norfolk County Board of Education*. The facts set forth by the applicant have not been challenged by the respondent. The respondent had the opportunity to cross-examine the declarant of the Form 9. The photocopies of the membership evidence which the applicant has filed are in writing and are signed by the employee. The applicant is relying on secondary evidence. In *The Law of Evidence in Civil Cases* 1974, by *Sopinka and Lederman*, the authors set out at page 281 the circumstances under which secondary evidence is admissible as follows:

Secondary evidence may be admitted when the court is satisfied that the original document existed and it has been lost or destroyed. Proof of its loss or destruction need not be made by direct evidence but may be proved presumptively by showing that a reasonably diligent search has been made in the places where the document was likely to be found. Whether the inference of loss will be drawn by the court depends upon the sufficiency of the evidence of the search made to find it.

See also *Re Beukenkamp et al. v. The Minister of Corporate Affairs* (1974), 43 D.L.R. (3d) 118, where the Federal Court ruled that a photocopy of a share purchase note was admissible in evidence upon satisfactory proof of the destruction of the original or loss of the original by showing it cannot be found after a diligent search. The issue of copies of originals has also been recently considered by the British Columbia Supreme Court in *Beatty v. First Exploration Fund 1987 and Company, Limited Partnership* (1988) 25 B.C.L.R. (2d) 377 where the court considered a partnership agreement which provided that proxies should be "written" and "signed by the appointor". Some of the proxies had been faxed in a timely manner. The court observed that the law had to take cognizance of technological advances in means of communication and that a faxed copy was essentially a photocopy of the original and should be considered as both "written" and "signed".

24. The applicant is faced with the loss of its original membership evidence through no fault of its own. The applicant has searched diligently and has done all in its power to find the original membership cards. The Board does not agree that in these circumstances the application ought to be dismissed with the applicant being left to contemplate whether it will re-sign the employees who signed the lost membership cards.

25. The evidence of the membership which has been filed by the applicant, although mechanically reproduced, is in writing as required by section 73(1) of the Board's Rules of Procedure. On the evidence before it, the Board is satisfied that the evidence of membership establishes that the persons, on whose behalf the evidence of membership has been filed, have applied for membership in the applicant and have paid to the applicant on their own behalf an amount of at least one dollar in respect of initiation fees in the applicant. The Board is therefore satisfied that these persons are members of the applicant within the meaning of section 1(1)(l) of the *Labour Relations Act*.

26. The circumstances in this application are highly unusual and the applicant has fully disclosed these circumstances to the Board. While the Board, on the facts before it, is prepared to accept the photocopies as satisfying the requirements for evidence of membership, it is emphasized that the Board will ordinarily require the best evidence which is available, namely, original evidence of membership, to be filed with the Board in support of an application for certification.

27. As was stated previously, the applicant and the respondent agreed on the description of the bargaining unit. However, the applicant and the respondent did not agree on the inclusion of certain persons in the bargaining unit. The respondent challenged the inclusion of the following persons for the reasons stated:

Brian Camerand	—	Exercises managerial functions within the meaning of section 1(3)(b)
William Barker	—	"
Yves Bouchard	—	"
Gordon Fey	—	"
Lorne Tyler	—	"
Florent Guilbert	—	Is an office and clerical employee
Gary Durling	—	Is a technical employee
Doug MacFarlane	—	Exercises managerial functions within the meaning of section 1(3)(b)
Paul Gratton	—	Not included for the purposes of the count under Board's 30/30 rule.
Vicky Mudrick	—	Is an office and clerical employee.

A Labour Relations Officer is authorized to inquire into and report to the Board concerning the duties and responsibilities of these persons with the exception of Paul Gratton where his attendance is in dispute.

28. The Board has determined, however, that the applicant's right to certification cannot be affected by the Board's ultimate decision as to the inclusion or exclusion of the disputed classifications. On the basis of all the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 16, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

29. Accordingly, the Board pursuant to its discretion under section 6(2) of the Act, certifies the applicant as the bargaining agent pending the final resolution of the persons in dispute.

30. A final certificate must await the final determination of the persons in dispute or an agreement on the same.

CONCURRING OPINION OF BOARD MEMBER W. H. WIGHTMAN; March 1, 1990

1. The law entitles the applicant union to deny the objectors an opportunity to have their petition tested to determine if the Board should order a secret ballot vote to determine the wishes of employees as to whether they shall be represented by the union.

2. The Board has no discretion in the matter. It is entirely up to the union to decide

whether the petitioners will be heard. The union has insisted on its legal right to be certified without the objectors being heard. While the decision of the union is correct in law, it remains to be seen whether it will assist the union in winning the ongoing support of the objectors, and others, in the bargaining unit or whether it will lead those whose voices were not heard to seek decertification of the union during the first open period.

2674-89-G Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario on behalf of All Contractor Members of the Electrical Contractors Association of Quinte/St. Lawrence and The Electrical Contractors Association of Quinte/St. Lawrence, Applicants v. **International Brotherhood of Electrical Workers**, and the International Brotherhood Construction Council of Ontario, and the International Brotherhood of Electrical Workers, Local 115, Respondents

Arbitration - Construction Industry - Construction Industry Grievance - Practice and Procedure - Union seeking advisory opinion on interpretation of collective agreement - Neither Union nor employer having taken action to assert their respective interpretations in concrete form - Grievance premature - Grievance dismissed without prejudice to refile in appropriate circumstances

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. Gibson* and *J. Redshaw*.

APPEARANCES: *P. Yudcovitch* for the applicants; *A. Minsky* for the respondents.

DECISION OF THE BOARD; March 20, 1990

1. This grievance has been filed pursuant to section 124 of the *Labour Relations Act*. When this matter came on for hearing on February 20, 1990, the respondents, International Brotherhood of Electrical Workers, and the International Brotherhood of Construction Council of Ontario, and the International Brotherhood of Electrical Workers, Local 115 (hereinafter sometimes referred to as the "trade union") raised two preliminary matters which go to the jurisdiction of the Board to hear this referral of the grievance, and the arbitrability of the grievance.

2. The respondents assert that the statutory conditions precedent which grant the Board jurisdiction to hear this section 124 referral have not been met insofar as the applicants have not delivered to the respondents "the written grievance" prior to filing this referral with the Board. The respondents also assert that the matter which is being referred to the Board is not "arbitrable" because it is not a "grievance", does not allege a violation or breach of the applicable collective agreement, in any event is premature, and is an attempt by the applicants to obtain a preliminary "advisory opinion" about a hypothetical case. The respondents take the position that as this matter is not arbitrable the Board is without jurisdiction. They therefore ask that these proceedings be dismissed. In so doing, the trade union relies upon the provisions of the *Labour Relations Act* ("the Act") and in particular, section 124, section 71 of the Rules of Procedure and the jurisprudence of this Board and Boards of Arbitration generally in respect of matters relating to "jurisdiction" and "arbitrability".

3. The applicants, Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario on behalf of All Contractor Members of the Electrical Contractors Association

of Quinte/St. Lawrence and The Electrical Contractors Association of Quinte/St. Lawrence (hereinafter sometimes referred to as "the employer") take a contrary position. They submit that the Board has jurisdiction to hear this referral and that this grievance is arbitrable.

4. In their submissions counsel for the parties acknowledged that there are a number of other issues which arise in this matter. Although "preliminary" issues, those issues appear to be inextricably tied to the "merits". Thus, for example, counsel for the trade union raised an issue as to whether the Electrical Contractors Association of Quinte/St. Lawrence was an appropriate applicant. The parties agreed however that the Board should deal with the issues relating to "jurisdiction" and "arbitrability" referred to in paragraph 2 prior to any adjudication upon the "merits". Counsel for the respondents submits that the Board should rule on those preliminary matters prior to dealing with the merits of the case. He takes the position that we ought not to proceed with any hearing in respect of the merits *unless* we conclude that we are unable to rule on the "arbitrability" question in the absence of hearing the evidence and submissions of the parties about the merits. Counsel for the respondents asserts that it makes little sense to conduct a two or three day hearing and have the Board then conclude that it is without jurisdiction or that this matter is not arbitrable. In any event counsel for the trade union asks the Board to render a decision which provides some "guidance" to the parties in respect of the preliminary matters referred to in paragraph 2.

5. Counsel for the applicants agrees that a decision in respect of these issues of jurisdiction and arbitrability prior to the commencement of any hearing on the merits is preferable but submits that such a decision is not necessary. She is prepared to proceed with the hearing on the merits and leave the issues with respect to jurisdiction and arbitrability to the end of the case. In anticipation of the Board decision in respect of these issues the parties have agreed upon April 2nd, 6th, and 17th as hearing dates, if necessary, for the continuation of this matter.

6. Before we turn to examine the facts and submissions of the parties, it is useful to set out section 124 of the Act.

124.-(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

(3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and the provisions of subsections 44(6), (8), (9), (10), (11) and (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

The Facts

7. On January 1, 1990, *The Employer Health Tax Act, 1989* (hereinafter referred to as Bill 47) came into force. By letter sent by registered mail to the respondents, counsel for the applicants wrote as follows:

Pursuant to Article 13.04 of the above-noted collective agreement we have been instructed by

the Electrical Contractors Association of Quinte/St. Lawrence and the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario to notify the Union that we will be filing a referral of Grievance to Arbitration Under Section 124, Construction Industry before the Ontario Labour Relations Board. A copy of the grievance is provided herewith for your review.

Enclosed with that letter was a completed copy of Form 104 entitled Referral of Grievance to Arbitration Under Section 124, Construction Industry before the Ontario Labour Relations Board. Paragraphs 5 and 6 of the enclosed form 104 state as follows:

• • •

5. The matter referred to be arbitrated:

The Parties disagree as to the interpretation, administration and application of the following provisions of the collective agreement between the Parties:

- 1) Section 21 -- Local Appendix regarding Local Union 115--Quinte/St. Lawrence and in particular *Clause 1000: Deductions and Remittances*.

"All employers shall deduct from each employee's wages for all union funds on a per hour earned basis and together with the contribution of the employers ECA Quinte/St. Lawrence Association Fund on a per hour basis and remit the total to a Union - appointed professional administrator," (et cetera).

and *Clause 1006*:

"In the event that a Government Medicare Plan is established and the Contractors are required to contribute to such a plan, it is expressly understood and agreed that the Contractors contributions to the Medicare Plan are to be paid by the Union Health and Welfare Fund or else the above hourly contributions are to be reduced so that the total contractor combined contribution to both the Union Health and Welfare Fund and the Medicare Plan will not exceed the hourly contribution defined in above item 1000".

The Respondent is requesting that the Applicant Electrical Contractors Association -- Quinte/St. Lawrence remit full hourly amounts per man hour worked to the Health and Welfare Plan as was done prior to the effective date of the Employer Health Tax Act, 1989, -- Bill 47.

It is the position of the Electrical Contractors Association--Quinte/St. Lawrence, its members, and all employers bound to the aforementioned collective agreement who perform work within the geographic jurisdiction of Local Union 115, that upon the effective date of the Employer Health Tax Act, 1989, Bill 47, that employers are to *reduce* the amounts referred to in the collective agreement as union funds (Union Health and Welfare Fund) by the amount that the employer is required to pay for each and every employee under the Employer Health Tax Act, 1989--Bill 47, and that this action is totally in compliance with the collective agreement generally and in particular the aforementioned Clause 1006.

6. The date on which the grievance was delivered to the other party:

Jan 23, 1990

8. The parties agree that this letter and Form 104 was sent by registered mail on January 29, 1990 and that nothing was, in fact, delivered on or about January 23, 1990. The parties further agree that there is no question of any prejudice to the respondents because of a lack of notice prior to the filing of the referral of Form 104 with the Board on February 2, 1990. The Form 104 which

was filed with the Board on that date is the same as the Form 104 enclosed with counsel's letter sent on January 29, 1990 except for the date upon which it was signed, and except that paragraph 6 indicates that "the date on which the grievance was delivered to the other party" as "January 29, 1990".

Delivery of the written grievance

9. Counsel for the respondents submits that the delivery of the "written grievance" to the other party prior to making a referral of the grievance to the Board is a condition precedent to the Board entertaining a section 124 application. He refers to section 124(2). Counsel submits that the letter sent January 29, 1990, and enclosed Form 104 is not, and cannot be treated as, a "written grievance". A "written grievance" is not the same as a "referral of grievance". He argues that a "written grievance" must be a written, separate document and that section 124 envisions a two-step process. The first step is delivery of that separate document, the "written grievance" under the collective agreement. The second step is the referral of the grievance to arbitration by the Board and the filing of Form 104 with the Board. Counsel asserts the purpose of this two-step process is to enable the parties some time prior to the referral to the Board to attempt to resolve the matter. Counsel submits that the "written grievance" referred to in section 124(2) is the "statement of claim in collective bargaining litigation". It is therefore a separate document which sets forth *inter alia*, the nature of the impugned conduct, the date and place when the impugned conduct occurred, the provisions of the collective agreement which are alleged to have been violated and the relief claimed. The Form 104 mailed by counsel for the applicant does not set out these matters. That is because Form 104 is simply the prescribed form for processing or "referring" another document, namely "the written grievance" to the Board. In support of these submissions, counsel points to paragraph 6 of Form 104 and argues, in effect, that this paragraph is superfluous if delivery of Form 104 itself is sufficient to constitute delivery of "the written grievance". Counsel cited the *Lummus Company Canada Ltd.*, [1976] OLRB Rep. January 980, *Arthur G. McKee of Canada Ltd.*, [1978] OLRB Rep. April 351, *Arlington Crane Service Ltd.*, [1986] OLRB Rep. April 417, *Ontario Hydro*, [1987] OLRB Rep. April 574 and *Ontario Hydro*, [1987] OLRB Rep. Aug. 1079 in support of these submissions.

10. In view of the determination we have made in respect of the "arbitrability" of this grievance, we find it unnecessary to address these submissions of counsel. In the circumstances we have found it necessary to address only the submissions of the parties as to whether the applicants have referred a "grievance", in the sense of a matter that is arbitrable pursuant to the terms of the Act and the collective agreement to which the parties are bound.

Arbitrability of the grievance

11. Counsel for the respondents submitted that this matter is not arbitrable and is not a grievance as it does not set out, or allege a breach of the Provincial agreement. Paragraph 5 of Form 104 merely indicates that the parties disagree about a particular clause in the collective agreement and recites the respective position of the parties as to their interpretation of that clause. The grievance does not set forth any conduct or misconduct and is premature. Counsel argued that at the time of its delivery a grievance had not yet "crystallized" or "matured" to a stage where it was capable of being litigated. Counsel submitted this was so for two reasons. First, Bill 47 came into force on January 1, 1990. Pursuant to clause 1006 of section 21 of the collective agreement remittances to the Union Health & Welfare Fund (hereinafter referred to as "The Fund") for the month of January 1990 need not be made until February 15, 1990. Therefore, until remittances are due, or must be paid, a cause of action in respect of those remittances has not "jelled" and cannot be litigated.

12. Secondly, counsel argued that at the time of its delivery, conduct which could give rise to a grievance “against” the union had not yet occurred. In fact, counsel for the respondents asserts, it is only when a contractor fails to remit, or reduces the contributions to the fund (with which the respondents do not agree) that a grievance crystallizes and a violation of the collective agreement occurs. In that instance, counsel submits it is *only* the trade union which has carriage of the grievance and which decides whether and when to grieve against a particular contractor who is in default.

13. Counsel argues that until there is either default by a contractor, and/or until the contractors request the trustees of The Fund to pay the amounts required to be paid by the employer pursuant to Bill 47 with monies from The Fund (which is not the grievance before us) no grievance has “materialized”. Upon the happening of either of these events the matter is arbitrable, but the proper parties to that grievance are the local union and the contractor. Until one of those events occurs there is no grievance but merely a disagreement between the parties.

14. Counsel submits that the present matter is therefore an attempt by the applicants to obtain an advisory opinion from this Board about the interpretation of the provincial agreement. Counsel asserts that until the current disagreement between the parties has crystallized in one or the other methods referred to in paragraphs 12 or 13 herein, the issue between the parties is hypothetical and moot. Counsel argues that the applicants’ attempt to get an advisory opinion on an academic question ought not to be condoned by the Board for it can lead to untenable results if parties to a collective agreement can come before the Board to determine if a proposed course of conduct violates a collective agreement. Counsel points to the “relief” requested in the grievance as supportive of his position that the applicants are seeking an advisory opinion. The relief requested appears to be a declaration that the employer can reduce the amounts referred to in the collective agreement as “Union Funds” by the amount that the employer is required to pay for each employee under Bill 47. In support of his assertion that the Board does not render advisory opinions or decide academic or hypothetical questions in the abstract, counsel referred to *Daynes Health Care Ltd.*, [1983] OLRB Rep. May 632 and *Beverly Enterprises Canada*, [1985] OLRB Rep. April 519.

15. Counsel for the applicants submitted that the provisions of the Act specifically provided for the arbitration of grievances concerning the “interpretation, application and administration” of the collective agreement (section 124(1)). She argued that this wording is broad and expansive and does not limit arbitration only to instances where a grievance alleges a violation of the collective agreement. Counsel pointed to the use of the disjunctive word “or” which precedes the phrase “alleged violation of the agreement” in support. Similarly, it was argued, section 124(3) gives the Board jurisdiction to “hear and determine the *difference* or allegations raised in the grievance”. It was asserted that the present application discloses that there is a “difference” between the parties in respect of the “interpretation, administration and application” of a provision in the collective agreement.

16. Counsel for the applicants distinguished both *Daynes Health Care Limited*, *supra* (an application under section 63 of the Act) and *Beverly Enterprises Canada*, *supra*, (an application under section 89 of the Act) as neither of those two cases involved arbitration by the Board. Counsel submitted that in those cases the jurisdiction of the Board was predicated upon the happening of some event, either a complaint “alleging a contravention” of the Act, or a consummated sale of business (as evidenced for example, by the words “to whom the business *has been sold*” in section 63). The applications or complaints before the Board in *Daynes Health Care Ltd.* and *Beverly Enterprises Canada* therefore *did* involve the Board in an attempt to provide an advisory opinion

about a hypothetical situation because the events giving rise to the application or complaint had not yet occurred.

17. Counsel argued, however, that in this instance the applicants were not seeking an advisory opinion about a hypothetical situation or a moot problem. She characterized the dispute between the parties as a “real” problem that arose after the enactment of Bill 47. She submitted that the dispute or differences between the parties would only have been hypothetical had the applicants filed this application prior to January 1, 1990 and in effect asked “what do we do if (or when) the Legislature passes this legislation.

18. Counsel states that the applicants are before the Board with a grievance concerning the interpretation of Article 1006 of section 21 of the agreement. She asserted that sound labour relations (and legislative direction in the Act) dictated that this type of dispute between the parties, involving as it does the interpretation of the collective agreement and its continued administration and application, should be resolved in an expeditious fashion through third party arbitration. The applicants should have access to a mechanism of obtaining interpretations other than by unilaterally deducting the amounts the employer is required to pay for each employee under Bill 47 from the remittances it makes to The Fund (thereby, at least according to the respondents, violating the collective agreement). Counsel for the applicants disagreed with counsel for the trade union’s position that it is only the trade union (and not these applicants) which can have carriage of this type of grievance involving remittances to The Fund. Counsel also disagreed that the union has carriage only after a contractor has failed to remit what the union considers are the appropriate amounts. Counsel submits that the type of difference which has arisen between the parties is in respect of a “policy matter” where there has not been a breach by either party. In those instances, either party should have available a mechanism as to how this difference is to be resolved.

19. Before we proceed to address those submissions we wish to emphasize that what we are being asked to determine at this preliminary stage is whether we can, or should, proceed to hear and rule upon the “merits” of this application. We are not, at this stage, asked to decide which of the opposing positions or interpretations of Article 1006 is correct. Which of the two disputed interpretations of Article 1006 is ultimately found to be correct is a matter which would obviously involve findings of fact and an analysis of the various provisions of the collective agreement. Although both counsel referred to Article 1006 in their submissions as to arbitrability, counsel made no submissions, or at best only certain peripheral comments, about the scope, meaning and application of that article. Counsel did indicate they were in dispute as to whether Bill 47 was a “government Medicare Plan”, whether the employer made “contributions” to that plan, whether the contractors made contributions to The Fund or merely remitted monies deducted from employees, and as indicated earlier the standing of certain party applicants to this grievance.

20. Although both counsel characterized this preliminary issue in respect of “arbitrability” as one dealing with whether the Board does or does not have the “jurisdiction” to entertain this grievance, we are of the view that it is a misnomer to refer to this as a matter which goes to our “jurisdiction” as that term is commonly understood. It may be that we have the “jurisdiction” to hear and determine the grievance but that nevertheless we should not arbitrate the grievance at this time because it is premature or seeks an advisory opinion. It is for this reason that we find that the issues raised by counsel in this preliminary motion are more appropriately characterized by asking the question - *should* this matter be adjudicated by the Board at this time and in this manner? That question and the submissions of counsel highlight the crux of the dispute between the parties regarding this preliminary motion. That dispute centers on *what* type of “difference” relating to the “interpretation” of an agreement is “arbitrable”, and *when* is that “difference” arbitrable at the instance of either party to the agreement.

21. Both section 44 and the combined effect of sections 124(1) and (3) provide for arbitration of all “differences” between the parties. The differences must “arise from” or “relate to” (to use the language of sections 44(1) and (2)) or “concern” (to use the language of section 124(1)) the “interpretation, application, administration or alleged violation of the agreement.” The meaning which is ascribed to the word “difference” can therefore have a significant impact upon when, and what type of matters or issues are arbitrated.

22. We do not view the statutory language or the language found in the collective agreement to be so broad or sweeping as to enable arbitration of *any* difference regarding the interpretation of a collective agreement at any time. If “difference” is given to the broad, liberal and expansive construction which counsel for the applicants advocates, it would permit the parties to a collective agreement to review, through grievance arbitration, their respective conflicting positions regarding any clause of the collective agreement at any time. It would equally permit *either* party to a collective agreement to either challenge, or seeks approval for proposed conduct or action so long as that proposed conduct or action could be linked to some collective agreement clause which requires “interpretation, administration or application”. Such a construction of what type of “difference” is arbitrable could ultimately lead to “management by arbitration”. Either party could turn to a Board of arbitration to seek an “interpretation” about any and all matters pertaining to the collective agreement and its continued “application” and “administration”. From a labour relations perspective, to permit either party to obtain an “interpretation” of a collective agreement provision so long as the parties “differed” about the proper interpretation of that provision (without reference to such factors as, for example, the nature of the grievance, the relief requested and the stage which the “difference” has reached) could lead to labour relations discord, and a lack of accountability on behalf of the parties to the collective agreement. Pursuant to such construction, for example, while parties are negotiating for the renewal of an existing collective agreement, either party could apply to have arbitrated their “difference” about the appropriate “interpretation” to be placed on provisions which are or could then be made to be the subject of debate and negotiation at the bargaining table.

23. After consideration of all the circumstances we have determined that, assuming we have the jurisdiction, we ought nevertheless not proceed with a hearing of the merits of this grievance at this time and under the present circumstances. In our view, the grievance is premature. Moreover, although we are asked to “interpret” the collective agreement, we do not view the conflicting positions of the parties in respect of article 1006 to be the type of “difference” for which the statute or their own collective agreement intends to impose binding arbitration in circumstances such as those presently before us. Rather, this grievance seeks an advisory opinion from this Board, by way of a request for discretionary declaratory relief about a “difference” which has not yet crystallized. Notwithstanding counsel’s assertions to the contrary, in effect the applicants come before the Board because they want to know what would happen *if* the contractors made remittances to the Fund but deducted from that the amount each employer is required to pay for each employee under Bill 47.

24. In this instance, the identity of the grieving party and the nature of the grievance, and the relief requested are critical factors in determining whether the asserted “difference” should be adjudicated upon its merits at this time. The applicants seek declaratory relief that their interpretation of clause 1006 is correct and that if the contractors deduct the amounts they must pay under Bill 47 from the amounts they remit to the Fund “... this action is totally in compliance with the collective agreement ...” We note that declaratory relief is a matter of discretion. Assuming we have the jurisdiction we would not grant such declaratory relief in the circumstances of this case. The only purpose for such declaratory relief in this case is to constitute some authority for use by

these applicants or other similarly situated as justification for deducting certain amounts from the monies they would otherwise remit to the Fund.

25. In this instance, the applicants who want the Board to exercise its discretion in their favour have control over whether the present "difference" between the parties regarding the interpretation of clause 1006 ever becomes more than a mere difference of opinion. In effect, then the applicants wish to adjudicate the "difference" between the parties about the interpretation of clause 1006 although they have not taken any action (save for the filing of this grievance) in which their position is asserted in concrete form. They are in effect seeking approval for proposed conduct although there is no indication that such conduct will actually occur. Moreover, the applicants wish to adjudicate *this* "difference" between the parties about the interpretation of clause 1006 essentially on the basis of assumed conduct (i.e. deductions from the amounts otherwise remitted to the Fund) notwithstanding their position that clause 1006 may provide another option namely payment of the amounts required to be paid by the employer pursuant to Bill 47 by the trustees of the Fund with monies from the Fund. From the submissions of the parties it is apparent that their "difference" in respect of clause 1006 can occur in more than one context or fact situation i.e. contractors fail to remit monies and/or Trustees fail to pay amounts required under Bill 47 with monies from the Fund. Yet the applicants desire adjudication of the "difference" regarding the appropriate interpretation of clause 1006 without the establishment of a firm factual context and without having exercised either of the two options it asserts are open to contractors bound to the collective agreement. In our view, the grievance is therefore premature because, at this stage of the "difference" there is no concrete issue between the parties, only a potential issue. In our view, the statutory language is not so broad as to require arbitration of "differences" if such arbitration is premature and a predetermination of potential disputes. Certainly these are not circumstances in which we would grant declaratory relief of the type requested here assuming we had the jurisdiction to arbitrate this difference in respect of the interpretation of the agreement.

26. The labour relations adjudicative process generally deals with and interprets language (found in either a statute such as the *Labour Relations Act* or a collective agreement) in the context of a particular situation and determines what rights or consequences flow from that language in light of that situation or context. Thus, for example, the collective agreement between these parties provide for the grieving and arbitration of individual and policy grievances (by either party) after the grieving party became aware, or reasonably should have been aware, of the "incident" giving rise to the grievance.

27. In the circumstances of this case whether the "incident" which can give rise to an arbitrable "difference" actually occurs lies within the control of the applicant grievors and the contractors on whose behalf it has filed this grievance. In our view, this grievance is premature because there has not been any "incident" which can give concrete form to the difference between the parties. We do not agree that the enactment of Bill 47 can be characterized as the "incident". It is not the enactment of Bill 47 which gives rise to this grievance. It is the parties differing opinions about clause 1006 which gives rise to this grievance.

28. Neither the Act nor the collective agreement provides for the arbitration of policy grievances which have not yet crystallized. Neither the Act nor the collective agreement provide for a prospective determination of issues that have not yet become clear and definite. Indeed, by the very language of the collective agreement the parties have indicated that it desirable to have a concrete dispute for adjudication and not merely a difference of opinion. At this stage and in the absence of some further action which focuses the "difference" in respect of the "interpretation" of the agreement we find this grievance has not crystallized and is premature.

29. For these reasons, we dismiss this grievance. This dismissal is without prejudice to either party filing a grievance in the appropriate circumstances. The Registrar is directed to cancel the hearing dates scheduled for the continuation of this matter.

2121-89-R A Group of Employees Employed by Kitchener Beverages Limited, Applicant v. United Food and Commercial Workers International Union, Respondent v. Kitchener Beverages Limited, Intervener

Petition - Termination - Circulators of petition holding positions closer to management than other employees - Board less inclined to draw inference adverse to voluntariness of petition in termination application than in certification application - Sufficient assurance of voluntariness in facts of case - Board directing representation vote

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members W. A. Correll and K. Davies.

APPEARANCES: *Rae Sands, Dan Dychuk, Blair O'Dell, Michael Fielding and Robin Damjanovic* for the applicant; *Elliott G. Posen, Roger Waite and Fred O'Toole* for the respondent; *R. A. Werry* for the intervener.

DECISION OF THE BOARD; March 9, 1990

1. The name of the respondent is amended to read: "United Food and Commercial Workers International Union".
2. This is an application for termination of bargaining rights under section 57.
3. Four bargaining unit employees who circulated a petition in support of termination of bargaining rights of the respondent union gave evidence. The union called no evidence. The first witness was Danny Dychuk whose job involves helping drivers to deliver soda. He has no supervisory or managerial duties. His wife typed up the petition forms at her office according to wording he obtained from an employee who had circulated a petition in opposition to the union a few years ago. He obtained seventeen of the signatures on the petition in one to one conversations with the employees. He explained to each of the people who asked that if they signed the petition it did not mean that the union was in or out; the Labour Relations Board would review the matter and if there were enough names, they would get a vote to see whether the union was in or out. Some just read and signed because they already knew what it was about. He kept the forms in his house when he did not have them on his person at the workplace. He worked with three other employees to whom he gave copies of the blank petition forms. He had no assistance from any owners or managers or any advice from them. There is nothing about the circumstances in which he obtained signatures which is of any concern as to the voluntariness of the petition.
4. James Blair O'Dell is a quality control officer who assisted Mr. Dychuk in the wording of the petition and its circulation. As part of his job duties, he has the right to speak to employees who are not doing their work up to quality control standards. He was acting as lead hand prior to his promotion to that position in the middle of October, after which he has received fifty cents more an hour. He has told employees "to shape up", but has never been involved in the administration of discipline, although he "could report things" to the Plant Manager. Mr. O'Dell circu-

lated a portion of the petition, sometimes keeping it in his desk in the quality control lab between November 3 and 14, 1989. The plant Manager has keys to the lab in which Mr. O'Dell's desk is located. Mr. O'Dell collected eight signatures under circumstances which do not raise concerns about voluntariness except to the extent indicated below.

5. The third person who assisted in the circulation of the petition was the shipper-receiver, Michael Fielding. He is responsible for seeing that the loads are built for the trucks and hands the assignments for the loads out to the people in the Shipping Department. If something is wrong with the loads which he checks he approaches his boss who may speak to that person to inform them how to do it correctly. He also reports on punctuality. When he was approached to sign the termination petition, he offered to become involved. He was then asked to "take care" of the part-time employees with regards to the petition. He was present for eight signatures in circumstances that do not raise concerns about voluntariness except as discussed below.

6. Robin Damjanovic is the night shipper. He checks off stock which is loaded onto the trucks to make sure the content is correct. He "keeps an eye on" part-time students who sort empty bottles and clean up. He can only instruct employees; he cannot do anything more if they do not do the work correctly. He makes reports on employees but it is the supervisor who records the problems. He, too, offered to help Dan Dychuk after he was approached to sign the petition. He witnessed thirteen signatures in circumstances which are not of concern concerning voluntariness except as discussed below.

7. There were some contradictions in the evidence of the four men who circulated the petition. Mr. O'Dell said that he did not give Mr. Dychuk any money to pay their lawyer, while Mr. Dychuk said that both he and Mr. Damjanovic gave him money although he had asked neither. Also, Mr. Dychuk testified that Mr. Fielding signed the petition in the parking lot, whereas Mr. Fielding said it was in a tavern in front of an unidentified third person. There was also some ambiguity about the location of the parking lot in which Mr. Dychuk says he obtained most of the signatures.

8. The union asks that the petition be disregarded because it says Mr. Dychuk's evidence should be disregarded as it is not worthwhile and truthful. He suggests that Mr. Dychuk mislead the Board in his evidence concerning Mr. Fielding's signature. Counsel queried how many other signatures were not gotten where Mr. Dychuk said they were. Secondly, he says his evidence was misleading about the location of the parking lot. Thirdly, Mr. Posen points to Mr. Dychuk's evidence concerning the arrangement for payment of his lawyer's bill - that he never asked anyone. Mr. Fielding, however, says that Mr. Dychuk asked him for money. Counsel submits that if he was not truthful in those areas then the rest of his evidence should not be allowed to stand.

9. As to Messrs. Fielding, Damjanovic and O'Dell, Mr. Posen submits that while appearing to be in the bargaining unit, they are so near management that their involvement in the circulation of the petition would tend to prejudice the application. They do daily reporting on quality and attendance and they are consulted about disciplinary action. He suggests that any of the cards signed by those three should be disregarded.

10. The company submitted that there was no suggestion that it was involved and that this is a matter between the employees and the union. However, counsel disputes the characterization of the three employees as near management. The company is involved in negotiations for a renewal of the collective agreement and feels that meaningful negotiations require the support of the employees. A vote would establish the employees' wishes in this regard.

11. On behalf of the applicant, counsel submitted that the application should be allowed as

the petition bears signatures of a majority of the bargaining unit. She argues there was no employer influence nor evidence that the care and control of the petition left any of the circulators. Although the Plant Manager had potential access to Mr. O'Dell's desk, there was no evidence that he had any occasion to go in.

12. The question to be determined is whether the Board has reasonable assurance that the petition represents the voluntary wishes of the employees who signed. This case poses some difficulty because of the positions held by three out of the four circulators. While the evidence of the manner in which the four employees circulated the petition does not show any actual employer involvement or perception of employer involvement, the fact that three out of the four circulators held positions closer to management than other employees is of significant concern. This is because of the danger that employees, knowing that these employees report to management on various matters ranging from the quality of their work to attendance and punctuality, would sign out of fear that they would also report whether they had signed the petition or not.

13. The Board has encountered similar situations in the past. For instance, in *Tip Top Tailors*, [1981] OLRB Rep. April 492, the Board said as follows, after concluding that the circulator of a petition was a lead hand:

9. This conclusion raises two competing considerations. On the one hand, Mr. Mazzei [the leadhand] is an employee in the bargaining unit, and *prima facie* entitled to exercise the rights granted to employees under *The Labour Relations Act*. On the other hand, pro-management activity by an employee enjoying special status, in the absence of other circumstances, can easily be misconstrued by employees as representing the acts of management itself, and the Board must be sensitive to the effect which such activities can have, intentionally or otherwise, on the voluntariness of other employees' acts. The Board grappled with this perplexing problem in the recent *A. N. Shaw & Sons (Eastern) Ltd.*, case, [1980] OLRB Rep. Oct. 1347, and articulated its approach in the following terms:

10. In assessing the voluntariness of the statement of desire, we are unable to accept the proposition that Mr. Foley stands in the same position as any other employee in the bargaining unit. Because of his supervisory functions, Mr. Foley's active involvement with the statement of desire raises concerns which would not exist if he were other than a working foreman. However, we also do not believe that his involvement with the statement of desire must invariably result in a finding that it cannot be given any weight. Rather, what is required is an examination of all of the surrounding circumstances and an assessment of whether other employees would likely have viewed Mr. Foley as acting on behalf of, or with the support of management, or whether they would likely have perceived him as a bargaining unit employee seeking only to further his own self-interests.

14. The Board has also pointed out that it will not be over-protective, or lightly deprive a bargaining unit employee (albeit with a position closer to management than others) of the right to participate in the processes under the Act respecting union representation. See *Grove Park Lodge*, [1980] OLRB Rep. Feb. 235 and *Irwin Toy*, [1983] OLRB Rep. April 536, among others.

15. In examining all the surrounding circumstances on a termination application the Board is less inclined to draw inferences adverse to the voluntariness of a petition than it is on a certification application. There is not the immediacy of the change of heart of those who shortly before had signed union cards to inevitably raise questions concerning the reason for the sudden change. However, the considerations are essentially the same, aimed at protecting the right of employees to make their own choice, rather than their perceived need, out of fear, to side with the choice the employer would make. See among others, *Imperial Clevite Canada Inc.*, [1987] OLRB Rep. March 375 and *Irwin Toy Limited*, *supra*, and the cases cited therein.

16. On the facts of this case, there is no evidence of circumstances in this workplace which would call for more than the usual amount of caution. Specifically, we have no evidence that would indicate perception in this case that signing the petition would have become known to management. Nor do we have evidence of inappropriate "salesmanship" based on closeness to management, such as in *Imperial Clevite, supra*, or of close personal relationships with members of management such as in *Johnson Matthey Limited*, [1987] OLRB Rep. April 518. The evidence of the manager's access to the quality control lab where part of the petition was for part of the time is of some concern. However, there was no evidence, despite the opportunity to present it, of the kind of use of such access or publicity about the location of the petition which would base an inference of involuntariness merely on the possibility that the manager could have had access. Given the lack of evidence of additional circumstances to raise particular concerns in this workplace, we are not prepared to infer a lack of voluntariness from the job classifications alone of the three circulators other than Mr. Dychuk.

17. In regards to the inconsistencies in the evidence of the circulators, we are not of the view that they are such as to discredit the evidence which otherwise accounts for all the signatures on the petition in circumstances that do not raise a concern that they were not voluntary. Although Mr. Dychuk was not very forthcoming about the arrangements for paying his lawyer, it is an area in which natural reticence about arrangements which are usually private plays a part. None of the evidence came near establishing that the employer had any role in the selection or payment of the lawyer, or that employees would have thought that to be the case.

18. We consider the confusion about the location of the parking lot, whether alongside the plant or nearby, to be insufficient to call into question the bulk of the evidence. Similarly, in the absence of any "suspicious" circumstances, the fact that Mr. Dychuk was apparently mistaken about where Mr. Fielding signed the petition is not of such significance as to warrant a conclusion that Mr. Dychuk's evidence was untruthful in the main. Particularly because Mr. Fielding was assisting in circulating the petition, which warrants an inference that he had more than one contact with Mr. Dychuk throughout this period, the Board does not find this lapse particularly important.

19. On balance, although the matter is not free from doubt, we are of the view that we have sufficient assurance of the voluntariness of the petition to warrant relying on it to put the matter to a vote.

20. The application is timely. We find that not less than forty-five percent of the employees in the agreed bargaining unit:

all employees of Kitchener Beverage Limited, in the City of Kitchener, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff and students employed during the school vacation period

at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on December 12, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union under section 57(3) of the said Act.

21. The Board directs that a representation vote be taken of the employees of the respondent employed in the bargaining unit described above. All those employed in that bargaining unit on the date of this decision who are so employed on the date the vote is taken will be eligible to vote.

22. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Kitchener Beverage Limited.

23. The matter is referred to the Registrar.

2304-87-R; 2305-87-U Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. **Nepean Bus Lines Inc.**, Respondent; Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 91, affiliated with the International Brotherhood of teamsters, Chauffeurs, Warehousemen and Helpers of America, Complainant v. **Nepean Bus Lines Inc.**, Respondent v. Dave Loney, Objector

Certification Where Act Contravened - Interference in Trade Union - Intimidation and Coercion - Unfair Labour Practice - Employer firing four union supporters and failing to retain another union supporter for training of replacement - Events occurring shortly after start of organizing campaign - Employees so intimidated by employer conduct that usual remedies unlikely to be effective - Vote unlikely to reveal true wishes - Union filing cards for approximately 25% of bargaining unit - Employer actions severe and at start of campaign - Substantial additional union support likely but for employer actions - Union having adequate support for collective bargaining - Certificate issuing

BEFORE: *S. A. Tacon*, Vice-Chair, and Board Members *F. C. Burnet* and *P. V. Grasso*.

DECISION OF S. A. TACON, VICE-CHAIR, AND BOARD MEMBER P. V. GRASSO: March 14, 1990

1. In a decision dated May 31, 1989, the Board certified the applicant pursuant to section 8 of the *Labour Relations Act*. Further, the Board found that the respondent had violated the Act in firing four employees (Bill Pilon, Paul Zakutney, Chris Chretien and Mike Bigras) and in not retaining Jean Jahn for some reasonable period to train her replacement; the Board directed the appropriate relief while remaining seized to deal with any disputes arising out of the implementation of the award. The Board's reasons for its decision and the Board's disposition of the remaining allegations were to be dealt with at a later date. As the Board noted, insofar as the improper terminations involved continuing liability and insofar as the hearing consumed many months, the Board regarded it as appropriate to issue its decision in a "bottom line" form. Further, in the Board's view, the issuance of a certificate to the applicant would enable the parties to commence their collective bargaining relationship without additional delay.

2. The Board subsequently was notified by the applicant that the union wished to withdraw the remaining allegations; the respondent did not object. Accordingly, those remaining allegations were withdrawn. Moreover, the Board expressed the view that no useful purpose would be served by the issuance of the Board's reasons for its earlier decision. Either party could request such reasons within a stipulated period. The applicant did request the reasons for the Board's certification decision and the Board hereby gives its reasons.

3. The Board does not regard it as necessary to set out the able and thorough submissions of counsel. Further, the Board has not attempted to recount in detail the evidence given over the many days of hearing. Rather, only those facts relevant to the Board's conclusions are recounted together with those matters critical to understanding the context in which the litigation arose.

4. In assessing the testimony of the witnesses, the Board has considered the usual factors affecting credibility but does not consider it necessary to resolve every conflict in the testimony which relates to matters which are relatively minor or peripheral to the issues before the Board (such as the alleged threatening telephone call to Pat Jahn). Having weighed and assessed the evidence, including the documentary material filed and the relative credibility of the witnesses, in the context of the parties' submissions and what is reasonably probable in the circumstances, the Board makes the following findings. Further comments on credibility are given at appropriate points in the decision but the Board would note at this point that John Raudoy and Mike Bigras were regarded as highly credible witnesses.

5. The respondent operates a bus company which primarily provides transportation for school children and also operates a charter service. The owners are Bill and Iva Stewart.

6. The union organizing campaign started in early November 1987 following several initial discussions between a few employees and John Raudoy, an organizer with the applicant union. A somewhat larger gathering took place on November 10 at a local restaurant. Those present included Raudoy, Pat Jahn, Jean Jahn, Mike Bigras, Paul Zakutney, Chris Chretien and Bill Pilon. One or two other employees were present only briefly. (Pat Jahn was a former employee of the respondent.) The group decided there was sufficient interest to begin signing union cards. Bigras and Chretien were the next to depart. Shortly thereafter, Bill Stewart and Iva Stewart entered the restaurant and observed Pat Jahn, Jean Jahn, Zakutney and Pilon seated with Raudoy. Raudoy left soon after the Stewarts arrived. All but Jean Jahn and Pat Jahn departed in short order, as well. Bill Stewart then walked over to the Jahns and informed Jean Jahn that she would not be required to do her bus route that afternoon nor thereafter. Jean Jahn had earlier given her notice. She had offered to remain until another driver was hired so that she could train her replacement and that offer was, until that point, apparently accepted. Later on November 10, Pilon's employment was terminated and Zakutney's employment was terminated.

7. The next day, November 11, there was another meeting of the union supporters at a different restaurant. On November 12, Chretien's employment was terminated. Although Chretien had left the restaurant on the 10th before the Stewarts arrived, Chretien had approached Loney about the union campaign and Loney passed on to the Stewarts the information of Chretien's involvement and the November 10th meeting. By November 12, of the core group of union supporters at the restaurant on the 10th, only Bigras remained. Bigras had left the restaurant, as noted, before the Stewarts arrived.

8. Following the initial terminations, the union supporters decided to distribute leaflets outside the respondent's premises on the morning of November 13. The leaflets discussed the union and invited the employees to a union meeting. Three employees (R. Congdon, G. Fairburn and L. Bastien) confronted the union supporters and made clear their vehement opposition to the union. That confrontation was heated. Shortly thereafter, Bastien, Congdon and Pat Ward accompanied Iva Stewart and Dave Loney to the union meeting which was held at Zakutney's home nearby. The group were refused entry to the meeting but remained outside in their vehicle for some time until the police were called and informed the group they could not continue to watch Zakutney's house. Some employees were observed leaving the meeting and Bigras' van was among the vehicles identified. Bigras was not among those distributing leaflets on the street in front of the

respondent's premises. However, as the sole member of the core group remaining, Bigras did approach employees to obtain their support for the union and tried with little success to sign cards. On December 1, Bigras' employment was terminated.

9. On November 15, the respondent called a unusual meeting with its employees. Although the meeting commenced with a brief review of company and school board policies and regulations, the bulk of the meeting was devoted to comments by Iva Stewart about "unions" and the ensuing discussion on that topic. Given the union's withdrawal of several allegations, the Board need not deal further with this meeting to specifically resolve whether the company's comments went beyond the limits of "free speech".

10. The Board also notes that the petition in opposition to the union was circulated on the company's premises. That activity was undoubtedly observed and tolerated by management. However, as the applicant seeks certification pursuant to section 8 of the Act, the Board need not consider further this issue either.

11. In dealing with the terminations of Pilon, Zakutney, Bigras and Chretien and the direction to Jean Jahn not to return to work, the jurisprudence is uniform on the appropriate test, which is succinctly stated in the oft-quoted passage from the *Barrie Examiner*, [1975] OLRB Rep. Oct. 745:

"...the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred".

12. The employer's explanation for the terminations of Pilon, Bigras, Zakutney and Chretien and the company's handling of Jean Jahn must be clear and convincing to dispel the natural suspicion which arises from the close proximity of those decisions and the appearance of the Stewarts at the restaurant on November 10 and their increasing knowledge of the identity of the union organizers. The Stewarts testified that Pilon was discharged for insubordination, the loss of a valid "B" licence, his attitude generally and because of complaints from passengers. Chretien was terminated ostensibly for his refusal to switch school runs, his reluctance to do charters on a regular basis, his bad attitude and rudeness. According to the respondent, Zakutney was discharged for his failure to have a medical and his bad attitude. Finally, Bigras was apparently terminated for reasons including his alleged body odour, bad attitude his constant complaining and complaints from passengers and other employees Jean Jahn was not required further as Loney was willing to do her run and did Loney not need to be trained.

13. However, the Board finds that Iva and Bill Stewart were not credible witnesses. Their testimony was riddled with inconsistencies and utterly implausible explanations were given when they were confronted with their earlier contradictory statements. The Board has no doubt that the Stewarts decided to terminate the employees involved because of their union organizing activities. The Stewarts then sought to justify their unlawful conduct by putting forward "acceptable" grounds for the dismissals. For example, "confidential employee histories" were placed in evidence, replete with examples of warnings for misconduct, etc. It is readily apparent, however, that these records were created well after the events in question.

14. This is not to say that the persons in question were necessarily model employees. Nor were they "long-service" employees. Zakutney did procrastinate in arranging his medical. It may well have been annoying that Chretien did not readily agree to switch runs or to do regular charters. Pilon did present some operational difficulties because of his licence classification. However,

Zakutney was not given a deadline for submitting his medical. Chretien was not told he had to switch runs and do charters regularly or face dismissal. Pilon could have continued on some runs even with his downgraded licence and, given the high turnover of drivers, it is probable he could have been assigned work until his licence difficulties were resolved or, at least until he had a reasonable opportunity to correct the problem. The Board has no hesitation in concluding that the *real* reason they were discharged was because of the respondent's desire to thwart the union's organizing drive by ridding itself of those persons identified as union supporters. The Stewarts simply seized on the shortcomings of those employees to cloak their anti-union animus. With respect to Bigras, the purported "reasons" for his termination were entirely specious. The company's decision regarding Jean Jahn was likewise without credible foundation. Jean Jahn drove her usual bus run on the morning of the 10th and was told not to return that afternoon to complete her run when she was seen at the restaurant with the union organizer. The Board does not believe that "coincidentally" a replacement driver was found in the interim, a replacement who need not follow the usual routine of accompanying the regular driver to learn the route.

15. Quite simply, the respondents have not given a satisfactory explanation for their decisions regarding the terminations or their treatment of Jean Jahn. The only reasonable conclusion from the circumstances, the testimony and the documentary material is that the respondent acted contrary to sections 64, 66 and 70 in this regard and the Board so finds.

16. Section 8 of the Act reads:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

17. It is appropriate to set out the following excerpt from *Di-Al Construction Limited*, [1983] OLRB Rep. March 356:

...certification pursuant to the provisions of section 8 of the Act was designed as both a deterrent to illegal employer interference in union organizational campaigns, as well as a device to provide a meaningful and effective remedy in those areas where an employer's interference has operated to destroy the free selection process guaranteed by section 3 of the Act. The wording of the section makes clear that certification under section 8 can only be granted if three conditions are satisfied, namely:

- (i) The Act has been violated.
- (ii) The true wishes of employees are not likely to be ascertained in a representation vote, or otherwise.
- (iii) In the opinion of the Board, the applicant has membership support adequate for the purposes of collective bargaining.

See also *J. Sousa Contractor Limited*, [1988] OLRB Rep. Oct. 1027; *Zenith Wood Turners Inc.*, [1987] OLRB Rep. Nov. 1443; *Cambridge Canadian Foods Inc.*, [1987] OLRB Rep. March 319; *General Metal Products of Windsor Limited*, [1985] OLRB Rep. Nov. 1596; *Toronto Fabricating Co.*, [1985] OLRB Rep. Oct. 1528; *Primo Importing and Distributing Co. Ltd.*, [1983] OLRB June 959; *Trulite Industries Limited*, [1983] OLRB Rep. May 821; *Robin Hood Multi-Foods Inc.*, [1981] OLRB Rep. July 972; *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Jan. 60;

Skyline Hotels Limited, [1980] OLRB Rep. Dec. 1811; and *Radio Shack*, [1979] OLRB Rep. March 248.

18. For the reasons given above, the Board has found that the respondent has contravened the Act and, thus, the first condition necessary to certification pursuant to section 8 is satisfied.

19. The Board next deals with the second element, namely, that the contraventions must have resulted in a situation wherein the true wishes of the employees are not likely to be ascertained through a representation vote. Substantial employer misconduct is required to justify this extraordinary remedy of certification pursuant to section 8: *Radio Shack, supra*, upheld 79 CLLC ¶14,216 (Ont. Div. Ct.); *Ex-Cello Wildex, Canada*, [1977] OLRB Rep. June 370; *Manor Cleaners*, [1982] OLRB Rep. Dec. 1848. The Board does, however, look to the cumulative impact of the employer's illegal activities: *K Mart Canada Ltd., supra*; *Robin Hood Multi-Foods Inc., supra*. In this case, there were illegal terminations of the all union organizers (Pilon, Bigras, Zakutney, Chretien) and the unlawful refusal to retain Jean Jahn for a reasonable period to train her replacement. As well, the Board notes the attempt by Iva Stewart to attend the union meeting and the tension amongst the employees who actually showed up at the union meeting. There is no doubt the employer misconduct was substantial. The cumulative impact was even greater. The Board must assess whether the remedies which could be directed with respect to the violations of the Act would effectively "restore the atmosphere" to the point where the union could continue to conduct its campaign. The Board does not consider that possible in the instant case. Viewed objectively, it is reasonable to conclude that the employees would have been so intimidated by the respondent's unlawful conduct that remedial directions for the section 89 violations would not dispel the chilling effect. The Board concludes that their true wishes are not likely to be ascertained in a representation vote.

20. Finally, the Board considers the third element, whether the membership support is adequate for purposes of collective bargaining.

21. It is useful to refer to a relevant passage in *Manor Cleaners Limited, supra*, at this point:

21. The issue of whether membership strength is adequate under section 8 has been found by the Board in prior cases not to be simply a question of numbers or percentages. In *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562, the Board stated at paragraph 22:

No arbitrary percentage can be arrived at that will apply in all cases. The Act requires the Board to determine what is adequate membership support by the light of its opinion depending on the facts of each case. In forming its opinion in any case the Board must have regard for all the circumstances.

Some of the circumstances or factors which have been considered by the Board in assessing "adequacy" are:

- (1) the stage of the union's campaign at which the employer conduct occurred (*Skyline Hotel Limited, supra*; *District of Algoma Home for the Aged (Algoma Manor), supra*;
- (2) the circumstances surrounding the cards signed prior to the employer interference and the number of cards signed (*Lorain Products*, [1977] OLRB Rep. Nov. 734);
- (3) the existence of a full-time unit which showed membership sufficient to support collective bargaining by its part-time counterpart (*Robin Hood Multifoods*, [1981] OLRB Rep. July 972; *Windsor Airline Limousine Limited*, [1981] OLRB Rep. Mar. 398);
- (4) the severity of the employer conduct insofar as it related to the number of cards signed - "the chilling effect" (*K-Mart*, [1981] OLRB Rep. Jan. 60);

- (5) the percentage of unit signing the cards where support for the union is at an extremely low level (5%) (*Sommerville Belkin, supra*).

In assessing adequacy the Board must engage in some measure of speculation regarding the union's prospects of successfully engaging in the sequel to certification, collective bargaining. If the union can and has mustered the totality of its support in the bargaining unit, certification under section 8 should not be used to foist union representation on those employees who would not have chosen this freely for themselves. The assessment must be taken with care (see *Skyline, supra*, at paragraph 62).

22. In the instant case, the union filed membership cards in respect of approximately 25% of the persons in the bargaining unit, 11 of 44 persons. That level of membership support was achieved in just two or three days of organizing. The solicitation of cards was brought to an abrupt halt by the mass terminations of Chretien, Pilon and Zakutney and the direction to Jean Jahn not to return to train a replacement. The union was left with only one employee organizer (Bigras) who was himself terminated once his union activities were known. The conduct of the respondent was egregious and the "chilling effect" of that conduct had a dramatic impact on the union's organizing ability. The Board notes Bigras' testimony that he approached employees after the initial wave of terminations but they were reluctant to get involved. Only one card was signed after November 13, the day the union conducted its leafletting and Iva Stewart tried to attend the union meeting. It is not surprising that the employees "got the message" that union support might adversely affect their continued employment. As noted in the passage quoted, consideration of adequate membership support is not a mechanical exercise with any specific arithmetical "cut off" point. Rather, the Board looks to all the circumstances. In the instant application, the Board has concluded that substantial additional membership support would probably have been obtained but for the unlawful conduct of the respondent. While the level of membership support in the instant case is marginally less than in other reported cases, the respondent's unlawful conduct was exceptionally severe and occurred at the inception of the union's campaign. The Board's approach is aptly set out in *Trulite Industries Limited, supra*.

24. The competing policy considerations which underlie section 8, are aptly set out by the British Columbia Labour Relations Board in commenting on a similar provision in its own statute. In *International Brotherhood of Boilermakers, Lodge 359 and Forano Limited* (1974) Can. L.R.B.R. 13, the Board observed at page 20:

... Certification without a vote... creates a real disincentive to the use of [intimidatory] kinds of tactics. It does so by depriving the offender of the fruits of its unlawful conduct... However, that is just part of the case for this remedy, because the party primarily affected by the certificate is the employees. We can assume that the Legislature did not want to visit the sins of the employer or the union on the innocent employees, who, after all, are supposed to be the beneficiaries of this freedom of choice about collective bargaining. Accordingly, the remedy is to be used where one cannot feasibly determine the true wishes of the employee through the normal means... It think everyone is aware of the risks involved in that kind of certification. In some cases, the employees may have foisted upon them a bargaining representative which they really don't want. Undoubtedly, the remedy must be carefully used...

25. As the above comments indicate, the wishes of the employees are always the Board's primary concern, and the remedy is not meant to be punitive; moreover, where support is not really there, the Board would not be placing the union in an enviable position by granting a certificate. Without the support of the employees the union would have a difficult time negotiating a collective agreement, and it would ultimately face the prospect of a termination application. On the other hand, the Board must not hesitate to consider the provisions of section 8 when it is the employer's own misconduct that impairs the Board's ability to ascertain with more certainty what the wishes of the employees really are. As the British Columbia Board went on to say:

...The Board must not be afraid to use it [the certification remedy] when it appears

appropriate. The Legislature conferred it for the very good reason that there is another equally serious risk to employee freedom. The majority in a unit may really want collective bargaining but have been intimidated from choosing it openly. The only way they will get it, is for the Board to certify the union...

Having regard to all these considerations, the Board finds that the union has demonstrated membership support adequate for collective bargaining.

23. The applicant has satisfied all the requisite elements in a section 8 application. The Board, for foregoing reasons, exercises its discretion pursuant to section 8 of the Act and, as noted in its earlier decision, certifies the applicant as bargaining agent for:

all employees of the respondent in the Regional Municipality of Ottawa-Carleton employed for not more than twenty-four (24) hours per week save and except supervisors, those above the rank of supervisor and office staff.

24. In its earlier decision, the Board directed the reinstatement of Pilon, Zakutney, Bigras and Chretien and their compensation for all losses flowing from their unlawful termination. With respect to Jean Jahn, the Board concluded that the respondent's decision not to retain her for a reasonable period to train her replacement was for reasons prohibited by the Act. The Board has remained seized to resolve any disputes arising out of the implementation of this award. The Board has found violations of sections 64, 66 and 70 of the Act in the respondent's conduct towards Pilon, Zakutney, Bigras, Chretien and Jean Jahn. Given that the applicant withdrew any remaining allegations and relief claimed in Board File 2305-87-U, the Board does not consider it useful at this juncture to make further findings or direct further relief.

DECISION OF BOARD MEMBER F. C. BURNET: March 14, 1990

1. Respecting the issue of a section 8 certification, I do not believe the three conditions precedent to applying section 8, and described in the majority award, have been fulfilled. Eleven signatures of forty-four employees of an operation which is both part-time and seasonal, and which experiences a 100% turnover rate in six months, is not persuasive evidence that a viable basis exists for collective bargaining.

2. Secondly, in the circumstances of this case, I do not believe that the true wishes of employees could not be determined by a secret ballot, promptly called and properly supervised. The union should have the advantage of employee meetings on company time and property to sell its case and the employees would have the evidence of these hearings that they are protected from unfair practices. Above all, they would have the assurance of the anonymity of a secret ballot supervised by the Ministry. The alternative is to transfer the decision to the Board, on the false and rather arrogant presumption that a Board can more accurately read the minds of 44 distant strangers than the strangers themselves are capable of expressing. I would accordingly have denied the application and ordered a prompt secret, supervised ballot to be preceded by meetings of employees on company time and property to allow the union exclusive opportunity to solicit support.

3. Respecting the issues of reinstatement and reimbursement, in the case of Mr. Bigras, I think the stated reasons for his discharge were not substantial and even if proved, warranted correction and reinstruction, not discharge. I would reinstate with full compensation.

4. Mr. Zakutney failed to provide a required medical after six requests in the first month of his employment. His reasons were patently manufactured. Nevertheless, given his belated compliance when faced with the fact of discharge, I would reinstate but without compensation.

5. Mr. Chretien sought to organize his job schedules around a second job. Management attempted to accommodate him to a reasonable degree, without however tying up vehicles needed on other runs. His rejection of these arrangements and insistence of controlling his own scheduling would justify termination of one even well beyond the probationary stage of his employment, which Mr. Chretien was not. However, as there was doubt concerning his claim of no notice, I would reinstate without compensation, subject to his acceptance of runs normally required by the business.

6. Mr. Pilon, also a probationary employee, was hired as a "B" driver, with a temporary licence, but was unable to get it validated by the Ministry of Transport because of earlier misdemeanours. He cannot legally be reinstated by the Board to the job for which he was hired, and there is no reason why the company should be required to make arrangements for him on some lesser job. That decision properly lies with the company, and I would not reinstate.

1569-89-FC; 2727-89-R Glass, Molders, Pottery, Plastics & Allied Workers International Union, Applicant v. **Northfield Metal Products Ltd.**, Respondent; Dave Mikel and Group of Employees, Applicant, v. Glass, Molders, Pottery, Plastics & Allied Workers International Union (AFL-CIO-CLC), Respondent v. Northfield Metal Products Ltd., Employer, Intervener

First Contract Arbitration - Practice and Procedure - Termination - Board exercising discretion to determine order in which first contract arbitration application and termination application were to be considered - First contract application was filed first, proceedings adjourned for continuing negotiations, then bought back on after filing of termination application - Board directing first contract application to be dealt with first - Bumping first contract arbitration behind termination would provide parties in similar circumstances with little incentive to continue negotiations - Parties having already had three days of hearing with associated expense of first contract issue

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *G. O. Shamanski* and *E. G. Theobald*.

APPEARANCES: *Joanne L. McMahon*, *E. C. Whitthames* and *J. Erskine* for the applicant; *Irwin Duncan* and *Gary Becker* for the respondent; *Terence J. Billo*, *David Mikel* and *Stephen Stairs* for the Group of Employees.

DECISION OF THE BOARD; March 16, 1990

1. This decision concerns the order in which an application for direction of the settlement of a first contract by arbitration under section 40(a) (the "first contract application") and an application under section 57 for termination of bargaining rights (the "termination application") respecting the same bargaining unit should be heard.

2. Submissions were heard on the above issue on March 2, 1990. The termination application was not scheduled to be heard until March 15, 1990, but counsel for the applicants in the termination application (the "petitioners") asked to address the Board on the above question before the scheduled hearing concerning the first contract application. Union and employer counsel agreed the Board should hear Mr. Billo's request, although Union counsel took the position his

request should be heard on March 15, and that status should not be granted to him in the section 40a application. The Board found it expeditious to deal with the matter at the outset and ruled orally at the hearing on March 2, 1990 that it would continue to hear the section 40a application and the termination application would be adjourned pending the outcome of that matter. Mr. Shamanski reserved his decision on this matter at the time and the Board said that reasons would follow in writing. The background of the matter, and our reasons for the oral decision, follow.

3. The union was certified on January 31, 1989, after a representation vote which was described by counsel for the petitioners as close. The results were disputed by the employer and a group of employees, but was upheld by the Board in a decision reported at [1989] OLRB Rep Jan. 57. The first contract application was filed on September 26, 1989 and first came on for hearing on October 11, 1989. It was adjourned on consent on October 11, 1989 to allow for negotiations with the help of a mediator, at which point an agreement was signed by the parties extending the time limits in which the Board is required to issue a decision in the section 40a application. This was an open-ended extension, with no provision that the time limits would begin to run again at some later date. On November 23, 1989, the matter was adjourned *sine die* (without a fixed date), again on consent, after three days of hearing in which evidence had been called, to allow the parties to return to the bargaining table with new chief negotiators. This they did, but were not successful in concluding a collective agreement.

4. On January 25, 1990, the union requested that the Board re-list the first contract application for hearing. Several hearing dates were set, the first of which was March 2. On February 6, 1990, the termination application was filed, supported by a petition bearing 195 signatures. There are said to be approximately 240 employees in the bargaining unit.

5. The termination application is, on its face, timely. The union was certified on January 31, 1989. There being no collective agreement in place to date, section 57(1) comes into play and employees in the bargaining unit have the right to apply for termination of the union's bargaining rights.

6. The Legislature anticipated the interplay of sections 40a and section 57 when it passed the first contract provisions. It inserted section 40a(22) which provides as follows:

(22) Notwithstanding subsection (2), where an application under subsection (1) has been filed with the Board and a final decision on the application has not been issued by it and there has also been filed with the Board, either or both,

- (a) an application for a declaration that the trade union no longer represents the employees in the bargaining unit; and
- (b) an application for certification by another trade union as bargaining agent for employees in the bargaining unit,

the Board shall consider the applications in the order that it considers appropriate and if it grants one of the applications, it shall dismiss any other application described in this section that remains unconsidered.

Thus, the Board has a wide discretion to consider what is appropriate.

7. Counsel for the petitioners submitted that the consideration of what was appropriate would include fairness, expedition, and the right of employees to decide whether they should continue to be represented by the union. Given the fact that the union had not contested the voluntariness of the petition in filing its reply, Mr. Billo submits that the wishes of such a large majority of

the employees, as expressed in the statement of desire, should cause us to adjourn the first contract application and hear the termination application first.

8. Mr. Billo suggested that we should treat the request to bring the 40a application back on, dated January 25, 1990, as a fresh application, and that due to the short time between it and the termination application, little weight should be given to the fact that it was filed first, especially given the "coincidence" that it was brought back on in the face of its knowledge of the petition which eventually supported the termination application.

9. Union counsel argued that the fact that three days of evidence had already been heard in this matter was an important fact. Although she agreed with the petitioners' counsel that the order in which the applications were filed was not determinative, she submitted that the fact that the Board was actually in the middle of the evidence should be a weighty factor. Equally, Ms. McMahon submits, it is fair to have the union's allegations in the first contract application dealt with first because the dissatisfaction which lead to the termination application may "have something to do with" the company conduct of which the union complains in that application.

10. Company counsel submitted that on the unusual facts of this case, all fairness is in the direction of allowing the petitioners to have their application heard first. The first contract application, although filed on September 25, 1989, was twice adjourned. Negotiations continued as late as February 22, 1990, after the request to bring back on the first contract application. Mr. Duncan submits that the one year time period in section 57 should have some meaning; the employees should not have to wait because the union chose not to proceed expeditiously with the first contract application, referring to the time limits in section 40a as mandatory. Since it is the union that has delayed, (presumably referring to its agreement to the extension of the time limits and agreement to the adjournments set out above), he submits that they cannot now argue prejudice. Additionally, he points out that there are now a large number of additional negotiation meetings to deal with, so that the first contract application will not likely conclude quickly. As to Ms. McMahon's submission that the company is responsible for the dissatisfaction among the employees, he refers to the dissatisfaction present in the bargaining unit as early as January, 1989, some of which is set out in the Board's 1989 reported decision, as well as to the fact that no allegation of employer encouragement of the termination application was made in the union's reply to it.

11. All counsel agreed that there were no cases "on all fours" with this fact situation. However, reference was made to *Co Fo Concrete Forming Construction Limited*, [1987] OLRB Rep. June 828, *Mansour Rockbolting*, [1986] OLRB Rep. October 1346, *Egan Visual Inc.*, [1986] OLRB Rep. Aug. 1071 and *Knob Hill Farms Limited*, Board File 1545-89-R, dated October 26, 1989, unreported. None of these fact situations is close to the one before us, although it is clear that the status of each application (which has included, depending on the facts, such things as whether hearings have started, whether the evidence is interrelated, whether a decision is about to issue) is a consideration that has been taken into account in the exercise of the discretion.

12. When the first contract application was adjourned in November, 1989, it was in the hope that harmonious labour relations could be furthered by a negotiated settlement of the issues outstanding. The Board took the parties' consent as an indication that this was a shared hope. The Board also was hopeful, as it considered it consistent with the stated purpose of the Act, to "further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining", to encourage the parties to try again. Accordingly, we are of the view that it would be inappropriate to treat the current situation as a new application filed on January 25, 1990, or there would be little incentive to parties in similar circumstances to continue to try to negotiate. Therefore, the Board considered the request to adjourn the first contract application

in the context of the scheduled continuation of an application filed on September 26, 1989, on which the Board had already heard three days of evidence, with the related expense to the parties. In making our oral decision we were of the view that it would be most appropriate in the circumstances of this case to continue with the first contract application so that the parties could have the benefit of the Board's determination of the issues contained therein.

0354-89-U; 0367-89-M The Society of Ontario Hydro Professional and Administrative Employees, Applicant/Complainant v. **Ontario Hydro**, Respondent v. The Coalition to stop the certification of the Society, on behalf of certain employees, Intervener

Collective Agreement - Unfair Labour Practice - Union complaining of employer failure to accept insertion of statutory arbitration provision into agreement - Necessary threshold determination whether agreement was collective agreement to which Act applies - Elements of estoppel established - Public interest not requiring that agreement between employer and union be treated as collective agreement under Act if parties agree otherwise - Unfair to permit retroactive characterization of agreement such that employer would have refused to sign it had characterization been applied at the time - Union estopped from asserting agreement one covered by Act

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

APPEARANCES: *James K. A. Hayes*, *Alda McMahon*, *Darlene Booth* and *Michael Brickell* for the applicant/complainant; *F. G. Hamilton* and *Brian Story* for the respondent; *A. M. Robinson*, *Peter Kirkby* and *Stewart Crampton* for the intervener.

DECISION OF THE BOARD; March 2, 1990

1. The applicant/complainant ("the Society") and the respondent ("Hydro") are signatories to a "Master Agreement" and a number of "subsidiary agreements". The Society takes the position in these proceedings that those documents together constitute a collective agreement within the meaning of the *Labour Relations Act* ("the Act"). In Board File 0354-89-U, it complains under section 89 of the Act that Hydro's refusal to acknowledge that it is bound to a collective agreement and its failure to honour a request that a clause of the sort contemplated by subsection 43(1) of the Act be added to that agreement constitute breaches of the Act for which the Board should grant a remedy. In Board File 0367-89-U, the Society applies under subsection 44(3) of the Act for an order modifying the arbitration provision in what it describes as the collective agreement, so as to remedy certain alleged inadequacies in that provision. This decision deals with the threshold question whether the Society and Hydro are parties to a collective agreement to which the Act applies. On that question, the respondent and intervener say that the existing agreements between Hydro and the Society do not constitute a collective agreement and that, in any event, the Society is estopped from asserting that they do.

2. The question dealt with here arose but was not dealt with in a pending application by the Society for certification for the unit of employees to whom the alleged collective agreement applies. One of the critical issues in that application was whether the Society is a "trade union"

within the meaning of clause 1(1)(p) of the Act. This panel of the Board heard extensive evidence in the certification application with respect to that issue and a related question whether the Society was the recipient of employer support which would preclude its certification. The panel came to the unanimous conclusion that the Society is a trade union within the meaning of clause 1(1)(p) of the Act which has not been the recipient of employer support within the meaning of section 13 of the Act: *Ontario Hydro*, [1989] OLRB Rep. Feb. 185; 1 C.L.R.B.R. (2d) 161 (the "status decision"). Without necessarily agreeing that all of the evidence we heard in connection with those issues is relevant to the issue to be dealt with in these proceedings, the parties agreed that we could treat all of that evidence as having been heard by us in connection with these proceedings, subject to the right of any party to call additional evidence.

3. Before presenting additional evidence, however, Hydro and the intervener (whose standing to intervene in these proceedings was not challenged) raised the preliminary objection that, in view of the outstanding certification application, these proceedings constituted an abuse of process to which the Board should respond by refusing to entertain them unless and until the certification application was withdrawn or disposed of. The panel heard and unanimously rejected that argument on the first day of hearing in these proceedings. Our explanation of that ruling and of our decision on the merits begins with a review of the certification proceedings.

The Certification Application

4. In the application for certification it filed on November 6, 1986, the Society asked that the Board conduct a pre-hearing representation vote. It was apparent from material filed that Hydro and the Society were parties to existing agreements which addressed the terms and conditions of employment of employees in the unit for which the application was being made. Hydro and the intervener ("the Coalition") opposed that application, but neither of them asserted a contract bar. Hydro and the Coalition also opposed the request that a pre-hearing vote be conducted.

5. Part of Hydro's argument against conducting a pre-hearing vote was that the Society already had a representational role under the existing agreements, so that delay in resolving its claim to such a role under the Act would not be as great a concern as it would ordinarily be: *Ontario Hydro*, [1987] OLRB Rep. Mar. 419 (the "show cause hearing") at paragraph 5. We had the Registrar solicit the parties' representations on whether the existing agreements could be other than a collective agreement if the Society were found to be a trade union. In their answers, Hydro and the Coalition took the position that the existing agreements between Hydro and the Society were not collective agreements. The Society's answer was that its agreements with Hydro did constitute a collective agreement. As we shall note later, this was the first time they had publicly taken that position. In the show cause decision, we directed that a hearing be scheduled to give the applicant the opportunity to address these concerns:

6. If the Board finds that the applicant is a certifiable trade union and if its current agreement with the respondent is a collective agreement, it appears it would follow that the applicant already has bargaining rights for employees in the unit for which it seeks certification, and no outcome of this application - and, hence, no outcome of a vote - could augment or diminish those existing bargaining rights. If, on the other hand, the applicant is not a certifiable trade union, then it can have no existing rights which are enforceable under the *Labour Relations Act* and no outcome of a vote could result in its having such rights. Unless the Board were to find that an employer and a union can contract out of the application to them of the *Labour Relations Act* and, further, that these parties actually did so without the applicant's thereby or thereafter having become uncertifiable, we have difficulty seeing how the applicant could be found to be a certifiable trade union without its existing agreement with the respondent being a collective agreement. While we have come to no firm conclusion on these points, we are led to wonder whether there is any possibility of an outcome of this application in which the results of a pre-hearing representation vote could have a meaningful part to play in the determination of the

applicant's right to represent the employees affected by this application. We therefore doubt that we should grant the applicant's request that a pre-hearing vote be conducted.

6. The parties' representations at the show cause hearing did not dissuade us from our tentative view that a pre-hearing vote should not be conducted. We decided not to conduct a pre-hearing representation vote, for reasons later reduced to writing and reported at [1987] OLRB Rep. Dec. 1589 ("the pre-hearing vote decision"), where we made the following observations:

22. At the hearing directed in our show cause decision, the parties were asked whether they could foresee an outcome of this application in which we could find the applicant to be a certifiable trade union (that is, a "trade union", as defined by clause 1(1)(p) of the Act, to which section 13 of the Act does not apply) without its agreement with Hydro being a collective agreement as defined by clause 1(1)(e) of the Act. The parties' answers tended to focus on the likelihood of a finding that the agreement is a collective agreement. For example, counsel for Hydro suggested that a finding that the applicant was a trade union on the application date would not necessarily mean it was a trade union when it entered into its agreement with Hydro. He observed that the Society's constitution was amended in November 1983, apparently with a view to the requirements of the Act, whereas the current Master Agreement was signed in September 1983 with effect as of July 1, 1983. Counsel for the applicant countered that it and Hydro had executed a further agreement after November 1983. This did not assist us with what we saw as the critical question, which may be restated this way: if the agreement is *not* a collective agreement, is there any likelihood that it does *not* constitute employer support within the meaning of section 13 of the Act? There was no serious challenge to the proposition that the Society receives very substantial benefits from Hydro pursuant to this agreement. Neither the Society nor any of the other parties argued with any vigour that the Society's existing agreement with Hydro might constitute *neither* a collective agreement *nor* employer support.

23. The doubt we expressed in our show cause decision remained after hearing the parties' oral representations. The applicant's position is that its agreement with Hydro is a collective agreement. That would mean it already has bargaining rights under the *Labour Relations Act* for the employees for whom it seeks certification. If that is so, certification can add nothing to its rights. (That is apart altogether from the question whether the existence of the agreement constitutes a bar under section 5 of the Act, an issue which has not been raised and which we are not yet in a position to assess.) Equally, dismissal of this application would not deprive it of such rights, as this is not a termination application. If the applicant is right, therefore, a representation vote would serve no useful purpose. The same is true if Hydro and the Coalition are right about the applicant's not being a certifiable trade union. Even if it "won" a vote, the Society could not be certified if it is not a certifiable trade union.

It is important to note that the observations we made in our decisions of March 17 and December 21, 1987 were not intended to be and are not dispositive of the issue before us in these proceedings. We were dealing there with the question whether to direct the conduct of a pre-hearing representation vote. The question whether the Society was a "trade union" had not yet been decided. Understandably, the factual assertions and legal arguments in support of the proposition that agreements between the Society and Hydro would not be collective agreements even if the Society was a trade union were not as fully developed at that point as they were later. In particular, as we noted in the pre-hearing vote decision, none of the participants argued with any vigour that the Society's existing agreement with Hydro might constitute *neither* a collective agreement *nor* employer support.

7. When the certification application came back on for hearing following the further processing required by section 5 of the Board's Rules of Procedure, there were a number of matters in dispute. We decided to first hear evidence and argument with respect to two questions (the "status questions"): whether the Society was a "trade union" within the meaning of the Act and whether the Society was disqualified from certification because it had received employer support within the meaning of section 13 of the Act.

8. Hydro's position is that a number of the persons "represented" by the Society under their existing agreements are persons who exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations who, by clause 1(3)(b) of the Act, are deemed not to be employees for the purpose of the Act. The Coalition supports that position. The Society denies that clause 1(3)(b) applies to any of its members or to any of those whom it represents under the existing agreements. In the certification application, Hydro argued that the inclusion of such persons in the Society's membership prevented it from being a "trade union" within the meaning of clause 1(1)(p) of the Act. While denying that any of its members was managerial, the Society argued in the alternative that the mere presence in its membership of managerial employees could not adversely affect either of the status questions. There was a consensus that the question whether the applicant was a "trade union" should be addressed initially on the assumption that the disputed individuals would be found "managerial" without, however, assuming the truth of any element of an allegation of employer support: see paragraphs 30 to 33 of the status decision.

9. We heard a number of days' evidence in the certification application with respect to the events of the more than 40 years during which Hydro had been dealing with the Society and its predecessors or precursors. At the conclusion of the evidence, the Society sought to argue not only that it was a "trade union" within the meaning of clause 1(1)(p) to which section 13 did not apply but also that its existing agreements with Hydro together constituted a "collective agreement" within the meaning of clause 1(1)(e) of the Act. We concluded that the applicant was a "trade union" as defined by clause 1(1)(p) of the Act even if, as we assumed, its membership included "managerial" employees. We also found that the Society had not been the recipient of "employer support" within the meaning of the Act. We were able to come to that conclusion without deciding whether the agreements between Hydro and the Society were collective agreements within the meaning of the Act. We did not find as strong a linkage between those issues as we thought there might be at the time of the show cause and pre-hearing vote decisions.

10. As we noted in paragraph 95 of the status decision, the Society asked us to decide whether its current agreements with Hydro constituted a "collective agreement" within the meaning of the Act even if such a finding was unnecessary to our disposition of the status questions. We did not do so, for reasons which were set out in paragraphs 96 and 97 of the status decision:

96. After we had concluded in March 1987 that a pre-hearing representation vote would not be conducted, we invited the participants' representations about the order in which we should deal with the issues in dispute and the procedure we should adopt in connection with the hearing of those issues. None of the participants then chose to put the status of the existing agreements directly in issue. This was not surprising. It would not have been in the interest of the parties opposed to the Society's having bargaining rights under the *Labour Relations Act* to assert that the existing agreements constituted collective agreements under that Act, since that would amount to a concession that the Society already had bargaining rights under that Act. The existence of a "collective agreement" covering the employees affected by this application would leave us without jurisdiction to entertain this application (unless it could be said that it had been filed during one of the "open periods" contemplated by subsections (4), (5) and (6) of section 5 of the Act). An assertion by the applicant of a proposition which, if true, would leave the Board without jurisdiction to entertain the application might well have led to our dismissing the application *without determining the correctness of the assertion*. That was an obvious disincentive to the applicant's pursuing the matter in this application. Another apparent reason for the Society's not having put the status of its agreements with Hydro in issue emerged during the evidence, when we heard that the Society's executive had rejected the idea of taking a "back door" route to *Labour Relations Act* coverage by taking or precipitating proceedings in which it would ask the Board to find that the Society's agreements with Hydro constituted collective agreements. They preferred to establish *Labour Relations Act* coverage of the Society's relationship with Hydro by means of a certification application based entirely on membership evidence obtained expressly for that purpose, so that the result would be based on a direct demonstration

of majority support for representation by the Society in collective bargaining under the *Labour Relations Act*.

97. We were surprised, therefore, when counsel for the Society raised this question again as a distinct issue which it wished to have decided in these proceedings. By that point, the simple answer to the request was that the two status questions were the only questions with which we were dealing in this phase of our hearings, and it would be inappropriate to deal with any other issue except to the extent that was necessary to resolve the two status questions. Any question whether the existing arrangement between the Society and Hydro constitutes a "collective agreement" within the meaning of the Act is complicated by the argument that the Society is estopped from asserting that those agreements constitute a collective agreement under the *Labour Relations Act* by reason of its having made contrary representations to its membership over a considerable period of time. There is the question whether the doctrine of estoppel can be applied in these circumstances. There is the question whether a trade union as defined in the *Labour Relations Act* can engage in the representation of employees covered by that Act except under the provisions of that Act. These are complex questions with which we would not want to deal unless it were absolutely necessary to the disposition of the matter before us. It has not proved necessary to do so in order to determine the status questions. Indeed, this certification application could be dealt with without ever resolving those questions.

11. The status decision was released on February 22, 1989. When the certification application came back on for hearing, counsel for the Society inquired whether it would be appropriate for it to then raise this collective agreement question for determination in that application. After he received a discouraging response, the application and complaint now before us were filed on May 5, 1989.

The Preliminary Objection

12. As we have noted, at the first day of hearing in these proceedings Hydro and the Coalition argued that these proceedings should not be entertained unless and until the certification application had been determined or was otherwise disposed of. They contended that the Board would not entertain a certification application with respect to a unit of employees for whom the applicant already had bargaining rights. Accordingly, they said, a trade union in the position of the applicant had to elect whether to seek bargaining rights through certification or assert that it already had such bargaining rights. The assertion of these inconsistent positions in parallel proceedings was, they said, an abuse of process for reasons which had to do, among other things, with the alleged duplication of resources which would result. While Hydro and the Coalition made a number of other arguments in this regard, they were really addressed to the merits of the question before us rather than to the propriety of our entertaining that question while the certification application remained outstanding.

13. The panel was not satisfied that it should either put the Society to its election as to which proceedings it would pursue or stay these proceedings. We ruled unanimously that we would hear the application and complaint on their merits. We observed in that oral ruling that "in the circumstances of this case, we do not have difficulty with the applicant, or indeed any affected person, pleading in the alternative with respect to whether the applicant already has bargaining rights." There is nothing inherently wrong or abusive about pleading in the alternative, and that is essentially what the Society was seeking to do. Had these proceedings been instituted at the same time as the certification application, they would have been listed together for hearing and heard in such a way as to prevent duplication of effort and eliminate the possibility of inconsistent results. The parties' agreement that evidence heard in the certification proceedings could be taken as heard in these proceedings eliminated duplication of effort as a serious concern. While the delay in pursuing this alternate claim created the possibility of some wasted effort in steps taken in the certifi-

cation application after the determination of the status questions, that did not seem to us sufficient reason to refuse to entertain these proceedings in a timely manner.

Facts

14. The Society says that the following documents together constitute a collective agreement:

- (a) the Master Agreement between the Society and Hydro dated September 20, 1983, together with the appendices thereto and the Subsidiary Agreements thereunder;
- (b) the Memorandum of Understanding between the Society and Hydro dated September 13, 1983, concerning representation of "OSS" and "TS" employees;
- (c) the Memorandum of Understanding between the Society and Hydro dated November 29, 1984, concerning revising the Master Agreement;
- (d) the Memorandum of Understanding between the Society and Hydro dated November 29, 1984, concerning application of the Subsidiary Agreements to "OSS" and "TS" employees; and,
- (e) the Memorandum of Understanding between the Society and Hydro dated March 26, 1987, concerning representation of employees on Salary Schedules 07, 08 and 09.

The parties' evidence and arguments focused on the history of the relationship between Hydro and the Society prior to their signing the 1983 Master Agreement, the documents themselves, the immediate context in which they were signed, and the Society's treatment of and representations about the documents before and after they were signed.

15. One of the arguments made by Hydro and the Coalition in these proceedings is that the inclusion of managerial employees among those covered by the agreements in question demonstrates that the agreements are not "collective agreements" within the meaning of the Act. As in the certification application, there is a consensus that the question at hand should be dealt with initially on the same assumption as was made in the certification application: that those whose "managerial status" is in dispute would be found to be managerial.

16. The relationship between Hydro and The Society prior to 1983 was addressed in paragraphs 7 through 18 of the status decision. What follows is in some ways a summary and in other ways an elaboration of what we said in that decision. Nothing we say here is intended to contradict what was said there.

17. As a result of certification by this Board on June 28, 1947, "Hydro Electric Power Commission Unit No. 1 Federation of Employee-Professional Engineers and Assistants" ("Unit 1") became the exclusive bargaining agent for "all persons engaged in the practice of engineering as that term is defined in *The Professional Engineers Act*, R.S.O. 1937, Chapter 237, who are in the employ of The Hydro-Electric Power Commission of Ontario [now Hydro] and who come within the definition of employee in the Regulations". It appears Hydro and Unit 1 made their first collective agreement in June 1948. In December of that year, regulations made under the *Labour Relations Act, 1948* amended the previous definition of "employee" to exclude "a member of the ... engineering ... profession qualified to practise under the laws of Ontario and employed in that capacity." Nevertheless, Hydro and Unit 1 continued to make collective agreements covering employees in the unit for which Unit 1 had been certified. Indeed, in 1955 the recognition clause in their agreement was expanded so as to include "professional scientists" and "graduate-

engineers-in-training" in the unit for which Hydro recognized Unit 1 union as "sole representative."

18. At some point in the early 1950s, Unit 1 came to be known as "The Ontario Hydro Unit, Canadian Federation of Engineers and Scientists" ("The Ontario Hydro Unit"). In late 1956, its parent body, the Canadian Federation of Engineers and Scientists, decided to dissolve. Those in attendance at a membership meeting of The Ontario Hydro Unit called and held for that purpose in November 1956 purported to adopt a new constitution along with a new name: "Society of Ontario Hydro Professional Engineers". Hydro treated the newly named organization as the bargaining agent under the collective agreement then in force between it and The Ontario Hydro Unit. In the status decision (at paragraph 43), we found that

... the evidence is insufficient to establish that the applicant is simply a continuation of the organization which was found to be a trade union in the 1947 certification decision. ... The proceedings taken by members of the Ontario Hydro Unit in 1956 ... might only have been effective, if at all, as the creation of a new organization and not as a continuation of the existing one.

In its own literature, the Society traces its origins to the "Society of Ontario Hydro Professional Engineers" with which Hydro began dealing in 1956. In the status decision we described the various names and constitutional changes the Society claimed to have gone through since that time. For the purpose of that decision, we found it unnecessary to determine whether there was a technically satisfactory constitutional continuum between the 1956 organization, each of the subsequent "Society of ..." organizations and the applicant. For the purpose of our review here of history prior to 1983, it is sufficient to note that in that period the relevant parties behaved as though there was such a continuum. For convenience, therefore, the organization or organizations with which Hydro dealt in that period will be referred to in what follows as simply "the Society".

19. In 1958, Hydro gave the Society notice of termination of the collective agreement then in effect. Hydro expressed the view that collective bargaining was an inappropriate way to deal with employee professional engineers. In addition, Hydro felt that all professional employees were a part of and should align their interests with management (see paragraph 17 of the status decision). Although the unit then represented by the Society included employees ("professional scientists" and "graduate-engineers-in-training") who were not "professional engineers", the Society did not pursue (and may very well not have considered) the question whether Hydro had a continuing legal obligation to bargain collectively with respect to those employees. Both before and after 1958, both sides acted as though they thought that Hydro was under no legal obligation to continue bargaining collectively with the Society because professional engineers were no longer covered by the then *Labour Relations Act*.

20. While Hydro was willing to have periodic discussions with the Society about matters of interest to its members, it refused to enter into any further formal agreement with the Society. It wanted an informal, consultative relationship in which the Society's role would be limited to putting forward the concerns of its members as a group, without being able to represent individual members in disputes with management. That was not enough for the Society's members, and the Society's executive pressed for continued formal collective bargaining. The Society sought recognition in a formal contract providing for conciliation and arbitration of differences. The Society described what they wanted as "a voluntary agreement - not one required by law" (Presentation to The Commissioners of The Hydro-Electric Power Commission of Ontario from the Society of Ontario Hydro Professional Engineers, 1959, p. 9).

21. In 1961, representatives of Hydro and the Society signed the following "Letter of Understanding":

LETTER OF UNDERSTANDING BETWEEN
THE MANAGEMENT OF ONTARIO HYDRO
and
THE SOCIETY OF ONTARIO HYDRO
PROFESSIONAL ENGINEERS

1. Management recognizes the Society as the representative body for all professional engineers and scientists of Ontario Hydro from MP1 to MP6 inclusive who are members of the Society except those employed in a confidential capacity.
2. The mechanism by which Management and the Society meet to effect agreement is confirmed; viz. matters of mutual interest are to be referred to the Joint Society-Management Committee, to which each body appoints an equal number of representatives. The Committee may agree to discuss any item of interest to either party, and to introduce or re-open items for discussion at any time.
3. Committee agreements are to be recorded in writing, and when such agreements have received mutual approval of Management and the Society, they shall become working conditions.
4. The Society accepts as a guide to conditions of employment at this time those items in the Management Guide and those Directives so far made known to the Society as they apply to professional engineers and scientists.
5. It is the intent of Management and the Society to devise a mutually acceptable grievance procedure as soon as possible, similar to procedures now being followed. However, final stage in such procedure shall provide compulsory arbitration by a third party.
6. It is the desire and intent of Management and the Society to co-operate in the early development of a system for settling any and all points of disagreement between them. It is mutually recognized that for optimum effectiveness such a system must in general ensure for Society members treatment comparable with that enjoyed by the members of certified bargaining agents recognized by the Commission.
7. Pending the development of the system referred to in Item 6, Management undertakes not to alter working conditions of Society members without prior consultation in the Joint Society-Management Committee or with the Executive of the Society.

Hydro and the Society went on to establish a redress procedure, as contemplated by paragraph 5, and written agreements on terms and conditions of employment, as contemplated by paragraphs 2 and 3. The relationship under this first "master" agreement continued for roughly ten years.

22. In February 1971, the then *Labour Relations Act* was amended to delete "engineering" from the list of professions whose members were deemed not to be employees by subsection 1(3)(a) and to add provisions now found in clause 1(1)(n) and subsection 6(4) of the Act. At that point, the Society's negotiations with Hydro had reached an impasse. One of the concerns which had been expressed by Hydro was that persons with what it considered to be managerial and supervisory functions were included in the Society's membership and in the unit it represented. The Society's understanding as of March 1971 was that Hydro was not prepared to enter into a further "voluntary agreement" covering that unit and was leaving it up to the Society to take whatever benefit it could from the new provisions of the then *Labour Relations Act*.

23. The Society then applied to the Minister of Labour for appointment of a conciliation officer under what is now subsection 16(3) of the Act. Hydro disputed the Minister's authority to

do so, and the Minister referred the question of his authority to the Board for its advice under what is now section 107 of the Act. During what we have been told was a one day hearing, the Society's General Manager acknowledged that at least 65 of its members were "managerial" and that, although those members did not have a part to play with respect to bargaining for wages or working conditions, "a potential for conflict of interest" did exist as a result of their membership. The panel hearing the matter noted that "[t]he Board over the years has refused to give status to purported trade unions on the basis that members of management are or have been involved in its organization." On that basis, it concluded that the Society was not a trade union and that, accordingly, the Minister did not have the authority to appoint a conciliation officer at its request: [1971] OLRB Rep. Aug. 501 (the "HEPCO" decision).

24. Following the 1971 decision, the Society's executive considered several options, including an application for certification and a return to the bargaining table with Hydro to seek a new "voluntary" agreement. It described the pros and cons of the certification and "voluntary agreement" alternatives this way in a news release to its members:

<i>Alternative</i>	<i>Pros</i>	<i>Cons</i>
1. Certification under the current Act	Recognition of specific, smaller group for bargaining purposes; retention of some professional identity; formal agreements under law (OLRA).	Only 500-600 members in the group; union label; legal costs to prevent too many exclusions from the group; limited leadership, with many of the best and most experienced leaders eliminated from the group; scientists and non-registered engineers excluded.
2. Voluntary Agreement	Some normalization of relations with Hydro Management; reopening discussions through JSMC; retention of professional identity.	An altered group, partly in keeping with some Management views; informal 'sounding board' negotiations with conciliation or advisor, but no binding decisions under law; no legislative strength.

Lobbying for new legislation and affiliation with OHEU (the union which represented the majority of Hydro workers - see paragraph 14 of the status decision) were also presented as alternatives.

25. Minutes of the Joint Society Management Committee meeting of November 17, 1971, record that

As a result of the report of the Ontario Labour Relations Board the Society stated that it wishes to continue to strive for a voluntary agreement with the Commission outside the Ontario Labour Relations Act.

The ensuing discussion centred around the composition of the unit. The Society is exploring the possibility of expanding horizontally.

In June 1972, the Society conducted a survey to determine its members' views on certification. The survey showed strong support for certification if "voluntary agreement" could not be obtained.

26. At the end of 1972, Hydro and the Society entered into a new master agreement. Its provisions included these:

- (1) Ontario Hydro recognizes the Society as the representative body for all professional engineers and scientists of Ontario Hydro in MP1 to MP6, FMP 11 to FMP 16 and Engineering Trainees who are members of the Society except those employed in a confidential capacity.

...

- (3) Negotiations between Ontario Hydro and the Society shall take place through a Joint Society-Management Committee to which each body will appoint an equal number of representatives. Negotiations shall be conducted in good faith and both parties shall make every reasonable effort to reach agreement on matters of mutual interest as expeditiously as possible.

This master agreement went on to provide that the parties' "agreements" were to be in writing. If agreement could not be reached on salary schedule adjustments, that matter was to be referred to an arbitrator whose award would be "final and binding upon the Society and the Commission." Other matters on which the parties could not agree were to be referred to mediation by a mediator selected by the parties. If the mediator was unable to effect a settlement, he was to recommend a settlement which the parties were obliged to seriously consider but not to adopt. Hydro retained "the right to make the final decision" on those non-salary matters. This master agreement also incorporated by reference the redress procedure Hydro and the Society had worked out in 1963, under which a member's complaint about "unfair treatment" could be referred by either Hydro or the Society to third party arbitration if not first successfully resolved in its multi-step grievance procedure.

27. The Society amended its constitution in 1973 to extend eligibility for membership to all those employees in Hydro's MP and FMP classifications who were not engineers or scientists. In June 1976, Hydro signed a new master agreement with the Society which provided, among other things, that

- (1) Ontario Hydro recognizes the Society as the representative body for MP1 to MP6 inclusive, FMP11 to FMP16 inclusive and staff on Salary Schedules 04 and 18, excluding those employed in a confidential capacity in matters relating to negotiations with respect to the Society or employees engaged in full-time security work, as contained in an agreed listing.

This clause has no limiting effect on any recognition clause that has been established under the Ontario Labour Relations Act.

This was the first master agreement in which the Society was recognized as "representative body" for all employees in the specified classifications, not just those who were members of the Society. It also extended that recognition beyond engineers and scientists to all employees in those classifications. Six months before the represented group was enlarged in this way, Hydro and the Society arranged to have an independent accounting firm conduct mailed ballot votes among the affected employees, to determine their wishes with respect to this proposed change. The group proposed to be added was polled separately from those already represented. In both groups, a substantial majority favoured the change.

28. In April 1983, Hydro gave notice of termination under the master agreement then in effect because the Society disagreed with its proposed changes to a subsidiary agreement on sur-

plus staff and the parties could not agree on the method by which that disagreement would be resolved. The termination was traumatic for the Society; its executive entered into the renegotiation of the Master Agreement with reduced faith in the viability of the "voluntary agreement" option. It again spoke of certification as an option, one which it did not wish any new Master Agreement to preclude.

29. From the signing of the 1972 Master Agreement until well after the signing of the 1983 Master Agreement, both in communications between them and in communications with Society represented employees, Hydro and the Society spoke of their relationship and voluntary agreements as being outside or beyond the jurisdiction of the *Labour Relations Act*, and the Society spoke of an application for certification as the route it would take to get the benefit of that Act if its "voluntary relationship" with Hydro became unsatisfactory. These propositions appear frequently in the literature the Society distributed to represented employees. That they do not appear with frequency in written communications between Hydro and the Society is not surprising, as they were a well settled basis of the dealings between them.

30. The evidence before us does provide a very clear example of a written affirmation by the Society in a quite public communication with Hydro in 1979. The first page of the March/April 1979 issue of the Society News, a regular publication distributed by the Society, bears the text of "An Open Letter To Hugh Macaulay, Chairman Designate of Ontario Hydro" sent for the purpose of formally introducing the addressee to the Society. In it, the Society said this:

The relationship between Ontario Hydro and the Society is defined in a short document called "The Master Agreement." The relationship so defined is not within the jurisdiction of the Ontario Labour Relations Act but is one that has provided sufficient freedom and flexibility and, over the years sufficient benefits to both parties that it is regarded with respect and in some cases envy by other professional groups.

31. There is evidence that after Hydro gave notice of termination of the master agreement then in effect, the Society's executive considered asserting that that master agreement gave it rights under the *Labour Relations Act*. During the negotiation of the 1983 Master Agreement, however, it did not do or say to Hydro anything to signal any change in its belief that the Act did not apply to either the agreement or their relationship. We do not think Hydro saw or could have been expected to see such a signal in the Society's statement (in its letter of May 9, 1983) that its participation in those negotiations was "without prejudice to any present or future position the Society may take concerning the status of the Master Agreement".

32. The nature of the Master Agreement was specifically discussed during the mediation process which led to the 1983 Master Agreement. It was the uncontradicted evidence of one of Hydro's witnesses that both parties told the mediator, who was the then Chairman of this Board, that the agreement was not a collective agreement. The Society's own report on the outcome of mediation quoted its counsel as saying "... As was mentioned by myself and the mediator, there is nothing to prevent the Society during the next four years in applying for certification if the relationship with the Corporation becomes unbearable."

33. The Society had amended its constitution in 1981 to allow employees in Hydro's OSS (Office Supervisory Services) and TS (Trades Supervisory) job classifications to become members. One of the matters discussed during the 1983 negotiations was expanded recognition to include these employees in the group represented by the Society. Hydro agreed to do this on certain terms set out in the memorandum of September 13, 1983 referred to in paragraph 15(b) above, if a majority of employees in each group voted in favour of Society representation. This memorandum had many of the features of the 1983 Master Agreement, but did not provide for determination of

salary matters by arbitration and had only a two year term. The parties had earlier arranged for the conduct by mail of a "representation vote", again under the scrutiny of an independent accounting firm jointly instructed by the parties. In each group, a very substantial majority of those who cast ballots favoured Society representation. The 1983 Master Agreement was signed shortly after those results were announced.

34. The provisions of the 1983 Master Agreement include the following:

MASTER AGREEMENT
BETWEEN
ONTARIO HYDRO
AND
THE SOCIETY OF ONTARIO HYDRO
PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES
EFFECTIVE JULY 1, 1983

1.0 Recognition

- 1.1 Ontario Hydro recognizes the Society as the representative body for MP1 to MP6 inclusive, FMP11 to FMP16 inclusive and staff on Salary Schedules 04 and 18, excluding those persons primarily employed in a confidential capacity and making effective recommendations affecting the terms and conditions of employment for Society-represented staff, and employees engaged in full-time security work, in the same or similar categories to those as contained in an agreed listing.
- 1.2 In the event of a dispute regarding the exclusion of a person employed in a confidential capacity, the matter shall be determined by an arbitrator selected in accordance with Article 8.0 of this Agreement.

This article has no limiting effect on any recognition clause that has been established under the Ontario Labour Relations Act.

2.0 Voluntary Membership

Membership in the Society is voluntary. Ontario Hydro will provide for a voluntary check-off of membership dues for staff represented by the Society in accordance with the Recognition Article 1.0 of the Master Agreement.

3.0 Joint Society-Management Committee

Negotiations between Ontario Hydro and the Society shall take place through a Joint Society-Management Committee (JSMC) to which each body will appoint an equal number of representatives. Negotiations shall be conducted in good faith and both parties shall make every reasonable effort to reach agreement on matters of mutual interest as expeditiously as possible.

• • •

8.0 Selection of Mediators and Arbitrators

Mediators and arbitrators will be selected from a panel of mutually acceptable persons and the costs of using them will be shared equally by Ontario Hydro and the Society.

9.0 Redress Procedure and Criteria for Agreements

The provisions of the Redress Procedure set out in Appendix D, and Criteria for Agreements set out in Appendix E of this agreement shall apply as if set forth in full herein.

10.0 Duration of Agreement

This Agreement shall come into effect on July 1, 1983, and shall remain in effect until July 1, 1987 and thereafter from year to year unless terminated by written notice by either party not less than six months prior to July 1, 1987 or the anniversary date. In the event that either party desires to amend but not terminate the Master Agreement, it must notify the other party in writing not less than two months prior to the anniversary date.

"L.R. Greenhotz"
President
Society of Ontario
Hydro Management and
Professional Staff*

"Milan Nastich"
President
Ontario Hydro

September 20, 1983
Date

*Name subsequently changed to The Society of Ontario Hydro Professional and Administrative Employees

35. As with previous master agreements, this agreement provides a framework for negotiations during its term with respect to changes in the terms and conditions of employment of those in the represented group. Mechanisms are provided for the resolution of differences on certain matters when they are not settled by negotiation. A wide range of matters may be the subject of mediation. If salary schedule adjustments and other directly related items (like overtime, shift allowances, compensation for working 12 hour shifts, travel time, for example) remain in dispute following mediation, Article 7.1 provides that

7.1 ...either party may, by notice in writing to the other, require that the dispute be referred to an arbitrator. ...

and also that

The arbitrator's decision shall be final and binding upon the Society and Ontario Hydro and shall be for a period of one year from the effective date of the award unless otherwise mutually agreed between the parties.

When the unresolved difference involves making a change to the provisions of a subsidiary agreement to be effective during the unexpired term of that agreement, the provisions remain unchanged. When the unresolved difference involves making a change to the provisions of a subsidiary agreement (other than one settled by interest arbitration) to be effective when its present term expires, Article 7.3 provides that

7.3 ...

- (b) If Ontario Hydro accepts the mediator's recommendations and the Society rejects the mediator's recommendations, Ontario Hydro shall retain the right to implement changes to the terms and conditions as recommended by the mediator and such changed terms and conditions will be deemed to constitute a subsidiary agreement between the parties.

- (c) If both parties reject the mediator's recommendations, or Ontario Hydro rejects such recommendations and the Society accepts such recommendations, Ontario Hydro retains the right, subject to Article 7.3(d), to implement changes to the terms and conditions set out in the expired subsidiary agreement.
- (d) The Society shall have the right to apply to the mediator, upon notice in writing to Ontario Hydro, for an order extending the expired subsidiary agreement which is the subject matter of the mediator's recommendations referred to in Article 7.3(c). The mediator shall grant an extension for a period of two years from the date of expiry of such subsidiary agreement. In the event of extenuating circumstances, Ontario Hydro may, upon written notice to the Society, apply to the mediator to make such amendments to the extended subsidiary agreement as he/she considers fair and equitable. The mediator shall consider submissions from both Ontario Hydro and the Society before rendering a decision.

Any order of a mediator to amend an/or extend an existing subsidiary agreement is binding upon both parties for such two-year period unless changed by mutual consent. Upon the expiry of such extension to a subsidiary agreement ordered by a mediator, Ontario Hydro shall be free to implement changes to such terms and conditions set out in the expired subsidiary agreement and such terms and conditions shall be deemed to constitute a subsidiary agreement between the parties.

36. The existing subsidiary agreements referred to in Article 4.2 covered such subjects as "Housing Assistance Plan", "Moving Expenses", "Vacations", "Statutory Holidays and Floating Statutory Holidays", "Funeral Leave", "Maternity/Adoption Leave", "Attendance at Court", "Extended Health Benefits", "Dental Plan", "Long Term Disability Plan", "Sick Leave Plan", "Pension Plan", "Life Insurance", "Advertising of Vacancies", and "Performance Appraisal Feedback and Advanced Warning of Reduced Performance Pay Standing."

37. The 1983 Master Agreement, like earlier master agreements, provides a Redress Procedure for dealing with grievances by Society represented employees. This involves consideration of the grievance at three Steps by increasingly higher-level representatives of the Society and Hydro. A grievance which is not resolved in the grievance procedure (other than one relating to the interpretation or application of the Performance Pay Plan or a job evaluation plan) may be referred to arbitration by the Society. Article 10 of the Redress Procedure provides that

Power of an Arbitrator

- 10.1 An arbitrator shall consider such matters of interpretation, application and administration of policy and practice as are specifically referred to him and shall consider only such evidence as is presented to him by representatives of Ontario Hydro or the Society.
- 10.2 The arbitrator shall have the power to settle or decide such matters as are referred to him in any way he deems fair and reasonable, and his decision shall be final and binding.

38. In the September 1983 issue of The Society News the lead article spoke about the ratification and signing of the new Master Agreement. It observed that

there are some who continue to argue that ... it was time to put the relationship on a strong legal footing. Still, there can be no doubt that a majority of the membership wants to give the new voluntary agreement a try before opting for a totally new form of relationship. Yet, it is clear that the formal endorsement of these agreements does not mean that all is as it once was. Rather, it means that the two parties have agreed on a new set of rules on which to try to rebuild a relationship outside the Labour Relations Act.

• • •

The new agreement is very much a sober, legalistic contract written for the times. ... We are no longer working with an illusionary gentlemen's agreement.

If the process is found to be unworkable and the relationship breaks down, the Executive will return to the certification alternative. So that this is a clear alternative within the next four years, amendments to the Constitution are being prepared to send out to the membership for acceptance. ... These amendments will reflect the new Master Agreement, especially recognition of OSS and TS staff, in addition to ensuring that our Constitution is not an obstacle if, in future, the Society membership provides a mandate to certify.

39. The proposed constitutional amendments were sent out. They included a change of the organization's name to its present one, a change in the language of the objects of the organization to expressly empower the Society to serve as "the collective bargaining agent" for member employees with Hydro and changes to its membership provisions to eliminate the Associate Member category and expressly exclude from eligibility for membership "those employees who are exercising managerial functions, or employed in a confidential capacity to such a degree that the Society and Ontario Hydro have agreed to exclude such employees from Society representation, in addition to any employee that the Ontario Labour Relations Board may deem to be excluded from the protection of the Ontario Labour Relations Act." In further explanatory material, the Society's executive said one of their reasons for proposing the amendments was that "it is considered prudent at this time to remove any obvious impediments to recognition as a bargaining unit under the Labour Relations Act, should the members ever endorse an application in the future." It is apparent from the context that "application" meant "certification application".

40. The proposed constitutional amendments were duly made, with effect as of November 1983. During the early 1980s, Hydro had been discouraging those on its Executive Salary Roll from maintaining Associate membership in the Society. In 1982, Hydro had stopped honouring the requests of ESR Associate Members that their dues in the Society be paid by payroll deduction. Those few on the Executive Salary Roll who remained Associate Members when the constitution of the Society was amended in 1983 were advised by the Society that their membership was terminated because they were no longer eligible for membership.

41. In late 1984, Hydro and the Society signed a further memorandum of understanding with respect to the OSS and TS staff. This had the effect of including them in the recognition clause of the Master agreement. Coverage by that agreement and all subsidiary agreements was extended to them for all purposes save interest arbitration, which was not to be available to settle salary differences for OSS and TS staff in the 1985 salary negotiations.

42. In 1985, difficulties the Society had with the 1983 Master Agreement, including a dispute over whether the arbitrability of complaints about certain actions by Hydro was itself a matter which could be determined by an arbitrator under the Redress Procedure, led to an exchange of proposals for amendment of the Master Agreement. Among the Society's proposals were: amendment of the opening words of the recognition article to read "Ontario Hydro recognizes the Society as the representative body *and sole bargaining agent* for" employees in the described categories, addition of a clause empowering arbitrators to decide disputes with respect to their jurisdiction and addition of clauses incorporating or implementing provisions similar to subsections (4), (6), (8), (9), (10) and (11) of section 44 of the Act with respect to arbitrators' jurisdiction and enforcement of their decisions. Among Hydro's proposals were articles which described the Society's representation and its "voluntary relationship" with Hydro as being "outside of the Ontario Labour Relations Act." None of these proposals was agreed to. The Society's executive decided to canvas the certification option with the membership again.

43. In the fall of 1985, the Society conducted a referendum on the certification option. A majority of those who cast ballots favoured pursuing that option. In January 1986, the Society began collecting membership evidence for use in a certification application. Literature circulated by the Society to members and potential members during this "card signing" or "organizing campaign" compared the situation under the "Voluntary Agreement" with the results of certification. The clear message of that literature was that the Society's rights under and in respect of the voluntary agreement were different from and inferior to those it would enjoy if the parties' collective negotiations and resulting agreements were governed by the Act. The possibility of asserting that the Master Agreement and related documents together constituted a collective agreement under the Act had been discussed by the executive again in 1985, but was not mentioned to the membership before the referendum or during the organizing campaign which followed it.

44. As we have already noted, the first time the Society first publicly took the position that it already had a collective agreement was in March 1987, after we raised the question during deliberations on the Society's request that a pre-hearing vote be taken. If they were not otherwise aware of this, the affected employees would have learned of it in mid-1987 from a special edition of The Society News. The first page carries the President's message. Speaking of the events of his first year in office, he made these observations:

...I would like to review the options we considered before applying for certification. We considered two approaches to getting our collective bargaining rights confirmed under the Labour Relations Act: voluntary recognition and certification. While we already felt we met the criteria for voluntary recognition, a sign-up campaign was seen to have the advantage of involving every member in the decision. We were also concerned that if the Board did not agree with us - that we already have voluntary recognition under the Act - the option of certification should still be there. The fact that the Board has recently chosen on its own initiative to focus on the prerequisites for voluntary recognition is a positive development in my view, and one which could save us time and money in the long run.

45. Hydro and the Society have continued to deal with each other under the Master and Subsidiary Agreements since March 1987, when the Society first asserted that they are collective agreements. While it was too late then to give the six month's notice of termination contemplated by the Master Agreement so as to terminate the agreement as of the 1987 anniversary date, Hydro did not give notice to terminate as of the 1988 or 1989 anniversary dates. One of Hydro's witnesses in these proceedings said that the Society did not behave in bargaining as though they thought they had a collective agreement; furthermore, he said, Hydro thought the statutory freeze resulting from the Society's certification application prevented it from terminating the Master Agreement.

Decision

46. The many points raised in the very thorough arguments of counsel for the parties addressed two main questions:

Can the doctrine of estoppel be applied so as to prevent the Society from asserting that the subject documents constitute a collective agreement and, if so, do the facts warrant the application of that principle?

Do the subject documents satisfy the express requirements of clause 1(1)(e) of the Act as well as any requirements which may be implied from the language of that clause and other provisions of the Act?

If the answer to the first question is that the Society can be and is estopped from claiming that the subject documents constitute a collective agreement, then it is unnecessary to answer the second question.

47. The threshold question with respect to the estoppel issue is whether the doctrine of estoppel can apply to prevent an assertion that an agreement is a collective agreement under the Act. The Society argues that the rights it asserts are statutory rights under a remedial statute which it cannot be estopped from asserting. Even if it had expressly agreed with Hydro that the subject documents would not constitute a collective agreement under the Act, the Society says, such an agreement would not preclude our finding that they do constitute a collective agreement under the Act.

48. In *Ontario Human Rights Commission et al. v. Borough of Etobicoke*, [1982] 2 S.C.R. 202, 132 D.L.R. (3d) 14, the Supreme Court of Canada considered whether it was an answer to a complaint about age discrimination under the *Ontario Human Rights Code* that the alleged discriminatory action was expressly permitted by employer's collective agreement with the union which represented the complainants. The Court dealt with this at pp. 213 and 214 [pp. 23 and 24 D.L.R.] of its judgment:

While this submission is that the condition, being in a collective agreement, should be considered a *bona fide* occupational qualification and requirement, in my opinion to give it effect would be to permit the parties to contract out of the provisions of the *Ontario Human Rights Code*.

Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy. In Halsbury's Laws of England, 3rd ed., vol. 36, p. 444, para. 673, the following appears:

673. *Waiver of statutory rights.* Individuals for whose benefit statutory duties have been imposed may by contract waive their right to the performance of those duties, unless to do so would be contrary to public policy or to the provisions or general policy of the statute imposing the particular duty or the duties are imposed in the public interest.

And in the fourth edition of the same work the following is to be found in vol. 9, p. 289, para. 421:

421. *Contracting out.* As a general rule, any person can enter into a binding contract to waive the benefits conferred on him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that it would be contrary to public policy to allow such an agreement. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement; and, in certain circumstances, it is expressly provided that any such agreement shall be void.

By way of example of an exception to the general rule, an agreement between an employer and employee whereby the latter agrees to waive a statutory duty imposed on the former in the interests of safety is generally not binding on the employee.

English authority expressing this principle is to be found in *Equitable Life Ass'ce Society of United States v. Reed*, [1914] A.C. 587. The question of the enforcement of a contract contrary to public policy is generally dealt with by Duff C.J.C. in *Re Millar*, [1938] 1 D.L.R. 65, [1938] S.C.R. 1, where reference is made to *Fender v. Mildmay*, [1937] 3 All E.R. 402, and other authorities. Examples of the application of the principle are such cases as *R. v. Roma*, [1943] 1 D.L.R. 238, 78 C.C.C. 340, [1942] 3 W.W.R. 525; *Outen v. Stewart and Grant et al.*, [1932] 3 W.W.R. 193, 40 Man. R. 557, and *Dunn v. Malone* (1903), 6 O.L.R. 484. The *Ontario Human Rights Code* has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract; therefore this argument cannot receive effect.

If an express waiver of or agreement not to assert statutory rights would not prevent a party from asserting them, then there should be no estoppel based on other behaviour of the party. The question, then, is whether the rights asserted here are the sort which can be waived by contract or otherwise.

49. The Society says that the *Labour Relations Act* is a remedial statute like the *Human Rights Code*. It imposes a framework for collective bargaining to further the public interest expressed in the preamble to the Act. Its provisions are intended to address the obvious inequality between individual employees and their employers. The Society says "it would be ironical [sic] if private ordering were permitted to supplant legislation enacted to remedy the historical inadequacy of private ordering."

50. It is well established that an employer and trade union cannot contract out of the application to them of the requirement that there be no strikes or lock-outs during the term of their collective agreement. An employer who has agreed at the bargaining table that its employees need not cross another union's picket line may nevertheless insist that they do so, as the Board observed in *Toronto Transit Commission*, [1984] OLRB Rep. Dec. 1781:

13. In both *King Paving*, [1976] OLRB Rep. June 291 and *Associated Freezers of Canada Limited*, [1972] OLRB Rep. May 445, there was a concerted refusal by employees to cross picket lines set up by another union. In both cases, the respondent employees pointed to a clause in their collective agreement which expressly allowed them to refuse. In other words, in both cases there was not just an established employer practice, but an express and purportedly binding contractual statement as to the parties' rights in the very circumstances under review. But in each case the Board said - to put the matter colloquially - "you cannot contract out of the Act". The "no-strike ban" is imposed by statute as a matter of public policy, not the private convenience of the parties. It admits of no exceptions. Any private arrangement which attempts to circumvent or avoid the thrust of the Act is void. I do not see how the parties' practice can stand on a higher footing than an express clause in their collective agreement; but even in the latter case, the Board has clearly found such clauses to be void.

See also *Pigott Construction Company Limited*, [1969] OLRB Rep. June 399; *Hutchison Mechanical Installations*, [1973] OLRB Rep. May 240; *Nelson Crushed Stone*, [1977] OLRB Rep 713; and, *Empress Graphics Inc.*, [1989] OLRB Rep. June 587; 3 C.L.R.B.R. (2d) 141.

51. Having regard to the Board's jurisprudence with respect to strikes, the Society argues that "if ... one cannot contract out of a portion of the Act, *a fortiori* one cannot contract out of all of it." It notes that the apparent mutual intention of parties to a collective agreement to restrict access to arbitration of certain matters has not prevented the Board from applying subsection 44(2): *American Motors (Canada) Limited*, [1973] OLRB Rep. Apr. 211; jud. rev. denied Oct. 1, 1973 (Ont. Div. Ct.), appeal dismissed (1974) 3 O.R. (2d) 528 (Ont. C.A.). It says that the Act is concerned not just with the regulation of strike and lock-out activity but also with protection of freedom of association and of the right to organize and bargain collectively. It submits that there is a public interest in those matters just as there is in freedom from discrimination. Bearing in mind section 50 of the Act, which provides that a collective agreement is binding on the parties to it, the Society submits it would be contrary to the language and spirit of the Act to permit parties who have objectively brought themselves within the terms of the Act to contract out of it.

52. Hydro and the Coalition argue that this is not so much a matter of parties "contracting out" of the statute as of parties choosing not to "contract in." The Society says that "this distinction is one only of semantics which serves merely to deflect attention from the central concern: if the parties have in fact entered [into] an agreement which satisfies the definition of a collective agreement, does the Act apply regardless of what might be said to have been their intention?"

53. It seems to us that the question here is not whether the parties can “contract out of” the Act in its entirety. If that were the question, the answer would be a simple no. That is because there is at least one respect in which they cannot “contract out of the Act”: they cannot contract out of the prohibition against untimely strikes and lock-outs. It does not follow, however, that there can be no respect in which the operation of the Act may be affected by agreement, waiver or estoppel.

54. Section 50 is a perfect example of a provision which is so affected. It is now well established that in appropriate circumstances one party to a collective agreement may be estopped by its words or conduct from enforcing an obligation imposed by the agreement on the other party, even though section 50 makes that obligation binding. Subject to the constraints of sections 15, 60 and 68, furthermore, the scope of the bargaining unit for which statutory bargaining rights have been granted by the Board under the Act can subsequently be altered by agreement of the employer and trade union. A trade union’s words or conduct may also effect an abandonment or waiver of its statutory bargaining rights.

55. There are some respects, then, in which the application of the Act can be waived, by agreement or otherwise. There are other respects in which it cannot. To determine whether the application of the Act can be waived in the respect with which we are concerned here, we have to consider whether in that respect the application of the Act involves the protection or advancement of the public interest.

56. We agree that the respects in which the application of the Act cannot be waived go beyond the strike and lock-out provisions. We agree that employees’ access to the practice and procedure of collective bargaining contemplated by the preamble to the Act is a matter of public interest addressed by the Act. An agreement other than a collective agreement which purported to restrict that access, by requiring or restricting employees’ membership or participation in a trade union or unions, for example, might well be contrary to the public interest and unenforceable as a waiver of statutory rights. That is not the sort of agreement with which we are dealing here.

57. A trade union does not have a statutory right to an employer’s “voluntary recognition”; that phrase would be a contradiction in terms if it were otherwise. If the employer of employees who wish to have a trade union represent them declines to treat that trade union as their exclusive bargaining agent under the Act, the trade union may apply for certification. An agreement which is not treated as a collective agreement would not bar an application for certification by either the trade union party to it or by some other trade union; employees would remain free to enter into collective bargaining under the Act through a trade union chosen by the majority.

58. The public interest does not seem to us to require that an agreement between an employer and a trade union be treated as a collective agreement under the Act if the parties to it expressly agree that it should not be so treated. We are satisfied, therefore, that the doctrine of estoppel can be applied so as to prevent the Society from asserting that the subject documents constitute a collective agreement under the Act, if the circumstances warrant application of that principle.

59. Hydro relies on the following formulation of the doctrine of estoppel by Lord Denning in *Amalgamated Investment & Property Co. Ltd., v. Texas Commerce Int’l Bank Ltd.*, [1981] 3 W.L.R. 565, [1982] Q.B. 84 (C.A.):

When the parties to a transaction proceed on the basis of an underlying assumption -- either of fact or of law -- whether due to misrepresentation or mistake makes no difference -- on which they have conducted the dealings between them -- neither of them will be allowed to go back on

that assumption when it would be unfair and unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

Hydro says that both parties proceeded on the underlying assumption that their agreement would not be subject to the Act. If it had thought the Master Agreement it was being asked to sign in 1983 would be treated as a collective agreement under the Act, it would not have signed it, would not have enlarged the scope of matters on which there could be interest arbitration, would not have enlarged the scope of matters on which it agreed to consult with the Society and would not have enlarged recognition to include the OSS and TS employees. The Coalition says there are employees who would not have joined Ontario Hydro if they thought that they would be covered by a collective agreement under the Act. Its counsel asks rhetorically how the affected employees could have known when the one year limitation period began to run on their right under section 60 to challenge the union's entitlement to represent them under the Act.

60. The formulation of the doctrine of estoppel on which Hydro relies certainly seems to apply to the facts of this case. In the dealings between them up to and including the making of the 1983 Master Agreement, both Hydro and the Society proceeded on an underlying assumption that such an agreement would not be a collective agreement under the Labour Relations Act. It would be unfair and unjust to permit the Society now to go back on that assumption, because that would retroactively give the agreement a character which would have led Hydro to refuse to sign it had that characterization been applied at the time.

61. It may be that Lord Denning's formulation of the doctrine of estoppel in *Amalgamated Investment & Property Co. Ltd., v. Texas Commerce Int'l Bank Ltd.*, *supra*, is broader than the doctrine recognized in Ontario. It makes no express reference to the "essential features" referred to in *Re Tudale Explorations Ltd. and Bruce et al.* (1978), 88 D.L.R. (3d) 584 (Ont. Div. Ct.) at 588: "an unambiguous representation which was intended to be acted upon and indeed was acted upon."

62. The Society argues that Hydro had its own legal advisers at all material times, and that Hydro relied on those advisers and not on earlier statements by the Society about the legal status of past agreements in determining what it would do in 1983. The Society made no representation during 1983 negotiations on that subject, it says. Moreover, the two years between the Society's mid 1987 assertion that the subject documents constitute a collective agreement and the mid 1989 filing of these proceedings was sufficient, it submits, to bring any detrimental reliance and any estoppel to an end.

63. In this case, the Society's words and past conduct conveyed two representations to Hydro: that the "voluntary agreement" it sought in 1983 would once again be an agreement outside the Act, and that if it wanted bargaining rights under the Act it would seek them in a certification application. When it made those representations, it knew that Hydro had no intention of entering into an agreement which gave the Society bargaining rights under the Act. It knew or ought to have known that Hydro would rely on its representations in those circumstances. Foreseeably, Hydro did act on those representations, and the Society must be taken to have intended that natural consequence of its conduct. It is fair to say that Hydro was not relying on the Society for legal advice. Hydro was relying on the Society's attitude, not its acumen. The significance of the Society's representations about the legal character of the agreement to be made was not that they might be correct but simply that they represented the Society's position.

64. We are satisfied that the features essential to the application of the doctrine of estoppel

are made out. There remains the question whether the passage of time since March 1987 has brought the estoppel to an end.

65. The Society's certification application triggered a "freeze" under subsection 79(2) of the Act, which prohibited changes to employees' rates of pay, terms and conditions of employment or other rights, privileges or duties of Hydro or the employees affected by the application. While the "freeze" required that the terms and conditions applicable to affected employees continue unchanged, it is not entirely clear that it prevented Hydro from terminating the Master Agreement itself in accordance with its terms. Assuming (without deciding) that the freeze did not prohibit termination, the fact that Hydro did not do so does not assist the Society on this issue. The estoppel which arose from the Society's representations about the 1983 Master Agreement continues in effect as long as that agreement does. In choosing not to bring that agreement to an end, Hydro did not enter into a new agreement with the Society, it simply continued to honour the existing one.

66. We find that the Society is estopped from claiming that the 1983 Master Agreement and subsidiary agreements constitute a collective agreement under the Act. The question whether the subject documents do constitute a collective agreement is academic, and need not be answered.

67. This application and complaint are dismissed.

2370-89-R International Alliance of Theatrical Stage Employees and Motion Picture Machine Operators of the United States and Canada, Theatrical Wardrobe Union, Local 822, Applicant v. Opera Ghost Productions Inc., Respondent

Certification - Evidence - Trade Union - Trade Union Status - Board not satisfied that applicant organization had complied with International By-Laws in establishing Local Constitution - Applicant failing to file current International Constitution - Board unable to conclude whether applicant governed by Local or International Constitution - Board unable to conclude that applicant was "trade union" - Applicant filing photocopies of membership evidence - Photocopies not normally acceptable as membership evidence for certification in absence of satisfactory reasons why originals not available - Application dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Rundle* and *E. G. Theobald*.

APPEARANCES: *Thomas W. G. Pratt* and *L. Diane Luckett-Reilly* for the applicant; *Scott G. Thompson* and *Ian Pool* for the respondent.

DECISION OF THE BOARD; March 20, 1990

1. This is an application for certification.

2. The applicant has not previously been found by the Board to be a trade union within the meaning of the *Labour Relations Act*. It is only if it is a trade union within the meaning of the Act that the applicant is capable of being certified by the Board as the exclusive bargaining agent for employees of the respondent.

3. The evidence before the Board is that, on February 6, 1950, the International Alliance of Theatrical Stage Employes [sic] and Moving Picture Machine Operators of the United States and Canada (the "International") issued a Charter constituting the International Alliance of Theatrical Stage Employes [sic] and Moving Picture Machine Operators of the United States and Canada, Theatrical Wardrobe Attendants, Local No. 822 as one of its Local Unions. Notwithstanding the difference in the spelling of the word "Employee" and the absence of the word "No." from the name of the applicant on its application, we accept that the applicant is the Local Union constituted by that Charter. We note that there is nothing before the Board which indicates that the International has previously specifically been found by the Board to be a trade union.

4. The applicant has existed continuously since its Charter was issued. Until 1987, it operated under the International's Constitution without any Local Constitution of its own. In 1987, the applicant decided it needed a Local Constitution which would address things which, in its view, were not adequately covered by the International's Constitution. Accordingly, it established a committee which reviewed the International Constitution and the Local Constitution of one of its sister Local Unions (Local 58), and drew up a Local Constitution for the applicant.

5. The evidence before the Board with respect to the applicant's present status is rather sparse. It does reveal that a draft Local Constitution was "presented" to members at a meeting, was voted on, and then sent to the International in New York for "endorsement". The International sent this draft back for revisions. These revisions which consisted of inserting dollar amounts in blanks in each of Article XI(3) and Article XII(5) (other blanks remained), were made and this revised draft was voted on at another meeting. The applicant then sent this revised draft Local Constitution back to the International which endorsed it on May 3, 1989.

6. Article 2(4) of the International Constitution provides that:

ARTICLE TWO

Section 4. Local Unions

Each affiliated local union, subject to the laws of this Alliance, shall exercise full and complete control over its own membership and affairs. This provision shall not be construed to confer upon local unions the power to enact law inconsistent with any portion of this Constitution and By-Laws.

7. Article 18 deals with the granting of charters to local unions. It contemplates a number of "classes" of charters, including one for Theatrical Wardrobe Locals (*The Stratford Shakespearean Festival Foundation of Canada* [1986] OLRB Rep. Nov. 1577 is a useful reference in that respect). It contains a specific reference to the applicant and a description of what the wardrobe attendants (also known as "dressers") do. In addition, section 8 of Article 18 provides that:

Section 8. Acceptance of Constitution and By-Laws

Any local union accepting and holding a charter from this Alliance, and becoming an affiliate in membership, does so only upon condition that it recognizes the supreme jurisdiction of the International Alliance and accepts the Constitution and By-Laws of the Alliance as its fundamental law, reserving to itself no rights of self-government inconsistent with the Constitution and By-Laws of the Alliance.

8. Article 19 of the International Constitution deals with the powers and duties of a local union. Sections 2 and 3 of that Article provide that:

Section 2. Home Rule

Home Rule is granted to all affiliated local unions of this Alliance and this shall be construed to confer upon each local union the authority to exercise full and complete control over its own affairs; provided, however, that no local union shall take any actions or adopt any laws which conflict with any portion of this Constitution and By-Laws.

Section 3. Constitution and By-Laws

The affiliated local unions of this Alliance may adopt individual Constitutions and By-Laws for their own government, but such laws or any proposed amendments thereto must be submitted to the International President for his approval before adoption. No constitutional provision or by-law shall be adopted by any affiliated local union without such approval by the International President.

Any local union failing to comply with the provisions of this Section shall be punishable [sic] by a fine, or suspension, or revocation of its charter.

In the event that any affiliated local union shall adopt any law without the approval herein above provided for or inconsistent with the provisions of this Constitution and By-Laws, such local law shall be void and of no effect and the members of the local union shall not be bound thereby.

9. Article 19 gives Local Unions which do not choose to adopt a Local Constitution a significant amount of autonomy within the structure that it establishes for them.

10. Other than section 3 of Article 19, there is nothing in the International Constitution which specifies a procedure to be followed by a Local Union which wishes to have a Local Constitution. However, Article 9 of the International's By-Laws, which governed the applicant at all material times, provides a comprehensive set of rules to be followed with respect to business conducted at its meetings.

11. Also in evidence before the Board are agreements between the applicant and The O'Keefe Centre, Maple Leaf Gardens, and the Royal Alexandra Theatre. L. Diane Luckett-Reilly, a Business Agent for the applicant, testified that the applicant has similar agreements with the Elgin Theatre, the CNE - Elizabeth Theatre, Roy Thompson Hall and the [Canadian?] Opera Company. The agreements filed with the Board look very much like "collective agreements" in that the stated purpose of each is to establish and maintain orderly collective bargaining, a grievance procedure, and wages and working conditions with respect to employees for whom the respective employers recognize the applicant as "the sole collective bargaining agent". Of course, whether these are "collective agreements" within the meaning of the *Labour Relations Act* depends on whether the applicant is a trade union.

12. Section 1(1)(p) of the *Labour Relations Act* provides:

1.(1) In this Act,

- (p) "trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

The Board cannot itself impose any pre-conditions to the existence of a trade union. Any such requirements must be found in the legislation (*Re CSAO National (Inc. and Oakville Trafalgar Memorial Hospital Association* [1977] 2 O.R. 498 (Ont. C.A.)). The Board does not "confer"

trade union status. Something is either a trade union or not as a matter of fact. The Board's function is to make that factual determination. It is not open to the Board to declare that an organization of employees which is factually a trade union is not one and vice versa.

13. Although the requirement that a trade union be an "organization" implies that it must have some structure, and the nature of the rights, obligations and duties that a trade union has under the *Labour Relations Act* suggests that there are certain characteristics that it must have, the only pre-conditions to trade union status under the Act are that at least two employees have agreed to be bound by the terms of an identifiable agreement between them (i.e., a constitution), which section 84 of the Act seems to contemplate will be in writing, for purposes which include the regulation of relations between employers and employees. There is nothing in either the *Labour Relations Act* or otherwise which dictates how an organization must be formed, structured or operated in order to be a trade union within the meaning of the *Labour Relations Act*. There is therefore no one formula which must be followed in order to successfully create an organization which is a trade union within the meaning of the Act. Whether a trade union has come into or continues to exist is a question of fact to be determined having regard to the circumstances of each case (see, for example, *Ontario Hydro*, [1989] OLRB Feb. 185; *L'Abbe Construction (Ontario) Ltd.*, [1987] OLRB Rep. Oct. 1191; *Hartley Gibson Company Limited*, [1986] OLRB Rep. Nov. 1517).

14. The circumstances which the Board will look at in order to make such a determination will be those material to the proceeding in which the question arises. In an application for certification, the date of application and the period during which membership evidence submitted in support of the application was obtained are the material times in that regard. As the Board said in paragraph 44 of *Ontario Hydro*, *supra*:

44. The issue here is whether the applicant was a "trade union" within the meaning of clause 1(1)(p) at times material to this application for certification. The application date is material, as is the period during which the evidence of membership was obtained. Except to the extent it assists the Board in assessing the applicant's status as of those material times, the question whether the applicant was a trade union at any earlier time is of no particular consequence: see *York University*, [1976] OLRB Rep. Apr. 181 at paragraph 10. When an organization's formation is followed almost immediately by an application for certification, the Board's close attention to the steps taken to create the organization is a natural consequence of the fact that there will be no other substantial evidence of the existence of the organization. When faced with an organization which claims to have been in existence for a considerable period of time, however, the Board has recognized that it will be less critical to focus on the steps originally taken to bring the organization into existence: *University of Ottawa*, [1975] OLRB Rep. Sept. 694 at paragraph 2; *Dustbane Enterprises*, [1986] OLRB Rep. May 607 at paragraph 14; *Fort Erie Duty Free Shoppe Ltd.*, (OLRB Rep. File No. 1023-87-R, decision dated September 18, 1987, unreported) at paragraph 7. It follows that it will not be critical to the Board's finding it to be a trade union that an applicant establish a technically satisfactory constitutional continuum from its date of origin to the present day.

15. Although the *Labour Relations Act* does not, and the Board cannot, specify how an organization must be structured or operated in order to be a "trade union" (except as aforesaid), the Board must have before it sufficient evidence to satisfy it that an organization is such a "trade union". An organization's own stipulations may affect what is required in that respect. In our view, it is not too much to expect that an organization satisfy its own stipulations.

16. The applicant is not a new organization. It has existed for some 40 years. Throughout that time, it appears one of its purposes has been to regulate relations between employers and employees and it appears to be currently active in that respect. On the evidence before the Board, the applicant has been specifically formed to and does represent wardrobe employees in theatres. Although the evidence does establish that the draft Local Constitution was presented and voted on

at meetings of the applicant, there is no evidence of the manner in which these meetings were called, when or where they were held, or how they or the votes in question were conducted. Consequently, the Board cannot be satisfied that the draft Local Constitution has gone through the procedure established by Article 9 of the International By-Laws as required.

17. Further, the International Constitution filed by the applicant is the one adopted July 18, 1986 and which the evidence establishes was revised on an unspecified date in 1988 at the biennial International Convention. The applicant neither filed a copy of the current International Constitution nor called any evidence with respect to the substance of the revisions which had been made to the one it did file.

18. In the result, the Board does not know whether the draft Local Constitution was presented and voted on at meetings called under the International Constitution adopted July 18, 1986 or the present International Constitution, and the Board cannot determine which of the three Constitutions (i.e., the draft Local Constitution, the International Constitution adopted July 18, 1986 and the present International constitutions) governs or "constitutes" the applicant.

19. If the Board could be satisfied either that the draft Local Constitution was presented and approved in accordance with the International Constitution in effect at the time (that is, in accordance with the applicant's self-imposed requirements), or that it was not but there was sufficient evidence to prove the present International Constitution (which is the root of the applicant's existence) which would govern the applicant in that event, the Board might be in a position to satisfy itself that the applicant is a trade union within the meaning of the Act. However, the evidence falls short of establishing either and the Board is not satisfied that the applicant is a "trade union" within the meaning of section 1(1)(p) of the *Labour Relations Act*.

20. The application must therefore be dismissed.

21. Before leaving the matter, the Board finds it appropriate to comment on one other issue. The membership evidence filed by the applicant in support of its application by the terminal date fixed therefor consists of photocopies of applications for membership in it and originals of receipts issued by the applicant to the persons purported to have made the applications, which receipts show that they have paid \$1.00 each in that respect. In the absence of a satisfactory explanation why the original membership evidence is not available, photocopies of membership evidence are not normally acceptable as evidence of membership for purposes of an application for certification (see section 73 of the Board's Rules of Procedure *Praetor Enterprises Limited*, [1983] OLRB Rep. April 592; *The Norfolk County Board of Education*, [1974] OLRB Rep. Mar. 182). In this case, however, the applicant did bring the originals of its membership evidence to the hearing and the respondent agreed that it could be accepted and relied on by the Board. In these circumstances (namely, the respondent's consent to the late filing of the membership evidence), the Board would have accepted and relied upon it.

1473-88-M Canadian Union of Public Employees and its Local 1680, Applicant v. Peterborough County Board of Education, Respondent

Employee - Employee Reference - Natural Justice - Parties - Only parties to a bargaining relationship may initiate employee reference - Persons whose status as "employees" at issue entitled to participate in proceedings - Such persons entitled to notice of application and of Officer's inquiry

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Ronson* and *D. Patterson*.

DECISION OF THE BOARD; March 6, 1990

1. This is an application under section 106(2) of the *Labour Relations Act*. By decision dated January 9, 1990, the Board authorized a Labour Relations Officer to inquire into and report to it with respect to the duties and responsibilities of the individuals named by the applicant as persons whose "employee" status is in dispute between the parties.
2. A meeting was convened by the Officer designated to conduct the inquiry. One of the individuals whose status is in question requested an adjournment in order to seek legal advice and, possibly, status to participate in the proceeding. The Officer adjourned the matter in order to give the parties an opportunity to make written submissions to the Board on that issue.
3. The respondent employer submits that any individual affected by this application should, upon request, be granted party status. The applicant takes no position. No individual who might be affected by the application has made any representations to the Board.
4. Section 5 of the *Statutory Powers Procedure Act* provides that:
 5. The parties to any proceedings shall be the persons specified as parties by or under the statute under which the proceedings arise or, if not so specified, persons entitled by law to be parties to the proceedings.

The Board has held the language of section 106(2) permits only a party to a bargaining relationship to apply for a determination of employee status (see, for example, *Central Park Lodges of Canada*, [1980] OLRB Rep. Oct. 1373; *Vernon John Hermer*, [1988] OLRB Rep. Feb. 152). That does not, however, mean that individuals whose status as employees is directly in issue have no status to participate in such proceedings. On the contrary, such individuals do have a right to do so on the basis that the rights are being directly affected. In *Central Park Lodges of Canada*, *supra*, at paragraph 9, the Board commented on this question as follows:

9. Counsel for the applicant employees submits that section [102(13)] of the Act and the recent decision of the Divisional Court in *Carmen Fisher et al v. Hotels Clubs Restaurants, Tavern Employees' Union, Local 261, Fuller's Restaurant, and Ontario Labour Relations Board* (1980), 28 O.R. (2d) 462; 80 CLLC ¶14,021 requires the Board to entertain the employees' application. We have considered both section [102(13)] and the court decision in *Fuller's Restaurant*, but have not found either very helpful in resolving the question presently before us. Section [102(13)] does not address the question of who has status to initiate a proceeding; it merely specifies that those persons who are proper parties are entitled to an adequate opportunity to make their submissions. *Fuller's Restaurant* involved the right of individual employees to present their evidence in a certification application in which they had properly intervened in accordance with a rule (Rule 48) which specifically contemplates such intervention. Their status to intervene was not an issue. There was no doubt that an employee in a proposed bargaining unit has the status to intervene and is a proper party to a certification application (see *Nick Masney Hotels Limited*, [1970] 3 O.R. 461; 70 CLLC ¶14,202 (C.A.)); however, employees cannot bring a certification application-only a trade union can. Similarly, employees may have a right to intervene

in proceedings before a board of arbitration, even though they are not parties to the collective agreement (see: *Hoogendorn v. Greening Metal Limited*, (1968), 65 D.L.R. (2d) 641 (S.C.C.)); but unless the agreement so provides, they cannot *initiate* a grievance - only an employer or a trade union can. Indeed, there is no doubt that if a section [106] application is made by one of the parties to the bargaining relationship, the individual employee affected would have the right to intervener and make his submissions. The Board has so held in *Brampton Transport Limited*, [1969] OLRB Rep. Jan. 1085. The issue in the present case, however, is not whether employees have a right to be heard when their interests are affected by section [106] proceedings; but whether they can, on their own motion, launch such proceeding when there is no questions between the employer or the trade union concerning the status.

(See also the *Board of Governors of Algonquin College*, [1979] OLRB Rep. May 366 in the context of an analogous provision in the *Colleges Collective Bargaining Act*).

5. Consequently, the persons whose status as "employees" is in issue in this proceeding are entitled to participate in it if they wish to do so. They should therefore be given notice of this application and of the Officer's inquiry. They should also be sent a copy of this decision.

2249-89-M Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Applicant v. Ridgewood Industries, Respondent v. United Steelworkers of America and Objecting Employees, Interveners

Collective Agreement - Termination - Union and employer applying for early termination of agreement - Early Termination would shorten "open period" - Rival union conducting displacement campaign and objecting to early termination - Board unwilling to grant early termination where effect would be shortening of "open period" - Application dismissed

BEFORE: *M. G. Mitchnick*, Chair, and Board Members *R. M. Sloan* and *C. McDonald*.

APPEARANCES: *B. Fishbein*, *Gary Caroline* and *Bill Gillet* for the applicant; *Barry Blidner* and *William J. Madigan* for the respondent; *P. Turtle* and *D. Lipton* for the interveners.

DECISION OF THE BOARD; March 9, 1990

1. This is a joint application under section 53(2) of the *Labour Relations Act* for early termination of the parties' collective agreement originally scheduled to expire on March 1, 1990. The application was filed with the Board on December 12, 1989, and stated as follows:

We, Textile Processors, Service trades, Health Care, Professional and Technical Employees International Union, Local 351 ("the Union") and Ridgewood Industries ("the Company") hereby jointly apply pursuant to Section 52 of the *Labour Relations Act* for consent to the early termination of our Collective Agreement effective from April 1, 1987 until March 1, 1990, a copy of which is enclosed. We have negotiated a new Collective Agreement which has now been ratified by the subject employees.

The Board, in accordance with its Rules and practice, sent Notices of the Application to the employer to be posted in the workplace, accompanied by the following standard form of letter:

Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 and Ridgewood Industries.

(Section 52(3) of the Act)

I am in receipt of a joint application from the above parties, for the termination of the current collective agreement. A copy of the current collective agreement has been filed with the Board.

The Board is prepared to give consideration to the parties' request that the collective agreement between them be terminated provided that it is first assured that such action will not prejudice the rights of any interested individual or organization.

Accordingly, you will please see to it that the enclosed Notices are posted without delay on your premises, in such conspicuous locations that they will most likely come to the attention of the employees concerned. The Notices shall remain so posted for a period of five working days from the posting thereof.

After the Notices have been posted for five working days, please complete the enclosed Declaration of Posting and return to the Board.

Upon receipt of the Declaration of Posting the case will be placed before the Board for disposition.

Very truly yours,

T. A. Inniss
Registrar

The said Notices were in fact posted by the employer on January 12, 1990, and stated:

TO THE EMPLOYEES OF: Ridgewood Industries

A JOINT APPLICATION, copies of which are attached hereto, has been made by the above named Employer and Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351.

The aforementioned Agreement would normally terminate on March 1, 1990.

Any person having objection to the granting of such consent shall file the same with the board, on or before the 19th day of January, 1990.

In default of filing a Notice of Objection as aforesaid, the Board may take such action in the matter as may appear to the Board to be just.

DATED this 10th day of January, 1990.

"T. A. Inniss"
Registrar.

On January 16th the Board received the following letter from the United Steelworkers of America:

Dear Ms. Inniss:

Re: United Steelworkers of America and Ridgewood Industries Ltd.; Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351; Application for Early Termination of collective Agreement; Board File: 2249-89-M; Our File: OLRB-856

The United Steelworkers of America has been advised that an Application for Early Termination of an existing collective agreement between Ridgewood Industries Ltd. and Local 351 of the Textile Processors has now been received by the Board.

The United Steelworkers of America represents employees in the bargaining unit of the above-captioned employer. The United Steelworkers of America opposes the Application for Early Termination and requests that the Board reject the application and thus prevent the granting of early termination which would result in shortening of the "open period". Consistent with this position it is requested that a hearing be scheduled in this matter and that the United Steelworkers of America be included as an intervener in these proceedings.

Thank you for your assistance in this matter.

Sincerely,

"Keith Oleksiuk"

Keith Oleksiuk
Associate Canadian Counsel

That was followed the next day by a further letter on behalf of the Steelworkers providing as follows:

Dear Ms. Inniss:

Further to Mr. Oleksiuk's letter to the Board on behalf of the United Steelworkers of America, and in support of the Steelworker's request to intervene in these proceedings whereby the Company and the incumbent Union seek early termination of the current collective agreement, which will bar our displacement application, in the context of our current organizing campaign, enclosed please find ____ applications for membership/receipts already collected by us.

Thank you for your attention and assistance.

"D. Lipton"

David Lipton
for: United Steelworkers
of America

As well, the Board received the following letter dated January 17th from 2 individuals apparently being employees in the bargaining unit:

Ms. Theresa Inniss
Registrar
Ontario Labour Relations Board
400 University Ave.
4th floor
Toronto, Ont.
M7A 1V4

January 17, 1990

Re: Board file #2249-89-M; Ridgewood Industries and the Textile Processors

Dear Ms. Inniss:

Enclosed please find a statement of desire expressing our opposition to the early termination request of the company and the incumbent union.

We wish to intervene in these proceedings. We do not want the board to grant the early termination request.

This request affects our right to change our bargaining agent. We want to change our bargaining

agent. We understand that the Steelworkers will also intervene in these proceedings. We want the Steelworkers to be our bargaining agent.

Thank you very much for your assistance.

cc: Dave Lipton, USWA
Brian Shell, USWA

On January 30th the Board received the following letter from the employer, Ridgewood Industries:

Dear Ms. Inniss:

Ridgewood Industries Ltd. entered into negotiations for an early termination of our Collective Agreement, at the request of our Employees, and their representatives Textile Processors, Local 351. We believe their sincerity in this request, and as a result, the employees ratified a memorandum of Agreement on December 5, 1989.

This memorandum of Agreement provides a wage increase retroactive to December 1, 1989 subject to approval of the Ontario Labour Relations Board for early termination. We would urge the Board to approve this early termination so that our employees might enjoy this much needed wage adjustment.

Ridgewood supports the wishes of their employees in this matter, and is further prepared to provide full assistance and co-operation to the Board, in their efforts to bring this request for early termination, to a conclusion, that represents the best interest of our employees.

Yours very truly,

"B. Blidner"
Barry Blidner
General Manager

And on January 31st the Board received a further document bearing the signatures of 96 "employees", and which read:

Re: O.L.R.B. File No. 2249-89-M

We have just learned of the intervention of the United Steelworkers of America in the above matter. We do not wish to be represented by the Steelworkers and want the labour board to do everything necessary so that our recently ratified collective agreement between the company and Local 351 can be immediately implemented.

2. A hearing was then convened on February 16, 1990, to hear the representations of the interested parties. Appearing in addition to the parties to the joint application was Ms. Paula Turtle, on behalf of the United Steelworkers of America and certain employees it claimed to represent. Ms. Turtle advised the Board that the Steelworkers had been conducting an organizing campaign in the subject bargaining unit since July of 1989, with a view to tendering an application for certification during the course of the January 1-March 1 "open period" in 1990. Ms. Turtle pointed out that it was open to the parties to the collective agreement to make whatever adjustments they saw fit, so long as the term of the agreement itself was not altered in such a way as to purport to close out all or part of the "open period". Ms. Turtle added that there can be any number of reasons why an organizing union may hold back its application for certification until the very last minute, and urged the Board not to permit the parties to do anything which would abridge the established open period, or otherwise interfere with the normal opportunity granted to employees to exercise their own "freedom of choice" as to representation in the workplace.

3. Mr. Fishbein, on behalf of the incumbent union, provided the Board with the history of the current re-negotiation of the parties' collective agreement. The original agreement had had a term of April 1, 1987 to March 1, 1990, and had specifically provided for the possibility during that term of the establishment of a third shift in the company's operation. The implementation of such a shift, however, was subject to negotiation with the union of its terms, and failing agreement, to binding arbitration. On July 31st, 1989, the company posted a notice proposing the introduction of a third shift, and that notice was met with a resoundingly negative response. The company then indicated to the union that it was prepared to approach the matter on a broader basis, and to sit down early to re-negotiate the whole agreement. The union agreed, and matters proceeded on that basis, with, Mr. Fishbein asserts, no knowledge whatever on the part of his client of the organizing activities concurrently being undertaken by the Steelworkers. Negotiation meetings in August and September led to a Memorandum of Settlement between the parties, but that Settlement was turned down by the employees on October 3rd. After further discussion a settlement was again put before the employees and overwhelmingly ratified by a vote of 106 to 22. The parties then made the present application to the Board.

4. Aware, as always, of the Board's jurisprudence, Mr. Fishbein acknowledged that the Board on questions of early termination has always been guided by its concern that it not "deprive another Union of a fair opportunity to complete its organizing campaign". On the facts here, however, Mr. Fishbein submitted that it simply cannot be said that the Steelworkers have not had a "fair" opportunity to organize the employees in this bargaining unit; by Ms. Turtle's own statements the Steelworkers have been going at it since last July, and in addition have had, as of the date of hearing, the benefit of all but the last ten days of the originally-scheduled "open period". Yet there has been not a trace of any application to displace the incumbent union as the bargaining agent, and the most obvious explanation for that, Mr. Fishbein suggested, is that the Steelworkers simply do not have the support. In the circumstances, Mr. Fishbein submitted, the Board should simply say to the Steelworkers: "It's too late", and allow the new arrangement worked out between the company and the incumbent (and overwhelmingly supported by the employees who wrote to the Board) to be put into effect without further delay. In fact, Mr. Fishbein noted, the new agreement called for a signing bonus of 100 dollars per employee, and that money has already been paid to the employees.

5. Mr. Madigan, on behalf of the employer, simply re-iterated the position, set out in the earlier correspondence to the Board, that the company's only concern was to do what was best for its employees, and to see the agreed-upon wage increase implemented as soon as possible. The response of Ms. Turtle to the submissions of Mr. Fishbein was that the intervener was not prepared to accept without evidence the statements as to motivation and knowledge set out by Mr. Fishbein, although submitted that the Board has never adopted the approach of trying to determine what in fact it was that lay behind the re-negotiation and request for an "early termination" of a collective agreement. Neither, Ms. Turtle noted, has the Board been prepared to "speculate" in circumstances such as the present what the current level of support for one union or the other might be, leaving that rather to the "open period" and the Board's normal channels for determining what the employees' own choice as to representation might be.

6. The Board's limited jurisprudence in this area was well canvassed by the parties at the hearing before us. The case most often referred to, as the "seminal" case under the subsection, is *Firestone Tire & Rubber Company Limited*, 54 CLLC 1484. That case in fact is of limited assistance, since there was no objection made to the application other than, in a conditional way, by the employer party to the agreement, but is nonetheless referred to in the case closer to our own of *National Cash Register*, [1967] OLRB Rep. April 90. In the latter case the Board set out the facts and its concerns as follows:

1. This is a joint application for early termination of a collective agreement. The agreement currently in effect between the parties became effective on July 6th, 1964 and would by its terms, expire on July 6th, 1967. In the normal course, the "open season" within which an application for a declaration terminating bargaining rights or an application for certification by another trade union might be brought would be the period from May 6th to July 6th, 1967. If the Board were to give its unqualified consent to the application now before it, such an application for certification or termination would be effectively foreclosed.

2. Notice of the application was posted pursuant to the Registrar's direction, and the intervener has objected to the application. It is agreed that the intervener had begun an organizational campaign among employees of the applicant company and that it represented employees of the company. There is no evidence as to the number of employees which the intervener might claim as members.

3. Counsel for the intervener urged the Board to grant consent to the early termination of the collective agreement only on terms similar to those which the Board imposed in the *Firestone Tire & Rubber Company Limited Case*, 54 CLLC 1484. In that case, the Board stated in part:

"... where a collective agreement is made for a term of more than one year and it has been in effect for at least the minimum period stipulated in subsection 1 of section 37 of the Act, there would seem to be no reason for the Board to refuse consent to its early termination unless it is made to appear that any person would be prejudiced thereby. For example, consent might be refused if it could be shown that the purpose or effect of early termination of the agreement would be to deprive another union of a fair opportunity to complete its organizing campaign among the employees bound by the agreement with a view to applying for certification in order to displace the established bargaining agency. Nothing of this sort came to the Board's attention in this case."

In that case, there was no objection to the application and no suggestion that another union might be deprived of the opportunity to organize. Nevertheless, the Board in granting consent to the early termination did so by providing for the giving of two months' notice of such termination. The effect of this was to substitute an earlier "open season" for that which would otherwise have preceded the termination of the agreement. In the instant case, of course, there is objection to the application and there is evidence of the sort contemplated in the *Firestone* decision.

4. It is true, as counsel for the company pointed out, that the intervener cannot rely on any "right" to organize established under The Labour Relations Act since the Act makes no reference to organizational campaigns. There is undoubtedly, however, a right of employees to join the trade union of their choice (section 3) and for this right to have any practical value there must be the concomitant possibility of the chosen unions applying for certification at a time when it would be possible to do so.

5. Counsel for the applicant trade union urged that the intervener should be required to show a substantial degree of successful organization among employees of the company before the Board would give serious consideration to its objection. On this count, it is noteworthy that in the *Firestone* case the Board preserved an open season even though there was no evidence whatever that any other union sought to represent employees. It is our view that the Board ought not to attempt to assess the chances of success of any union's organizational campaign nor should it attempt to establish what might constitute a "substantial degree of successful organization" in any particular case.

6. *In our view, it is of vital importance that an open season be preserved at least where any person or organization having an interest takes objection to its foreclosure.* It has not been the Board's practice in recent years to preserve the open season where no objection has been taken to a joint application of this sort. Thus, in a joint application by the instant employer and the Canadian Office Employees Union No. 159 N.C.C.L., Board File No. 12757-66-M, the Board on April 12th, 1967, granted consent to the termination effective January 1st, 1967 of a collective agreement in effect between those parties. *Where there is objection taken, however, it is our view*

that foreclosure of the open season would constitute a denial of the rights of employees under The Labour Relations Act.

[emphasis added]

There, as here, there had been a “ratification” vote taken by the incumbent union of the terms of the new agreement (as well as of the application itself). About that the Board had this to say:

7. In a letter to the Board accompanying the application, the applicant trade union stated that following notice to employees a ratification meeting was held with respect to a new collective agreement which had been negotiated by the parties. Some 180 employees attended the meeting (the applicant company has approximately 480 employees) and a majority voted in favour of ratification. The meeting then voted unanimously in support of the present application. It was not argued at the hearing of this matter that these events raised any estoppel against objections to this application. We would observe, however, that it would require clear evidence of waiver of each employee’s right to participate in proceedings leading either to certification of another trade union or termination of the incumbent union’s bargaining rights for such an objection, if taken, to succeed. Even assuming that no question as to the propriety or sufficiency of notice to employees arose, it would not be the case that “ratification” proceedings necessarily implied the waiver of their rights under the Act by those employees who received such notice.

The Board then stated its conclusion as follows:

8. Having regard to all of the foregoing, the Board consents to the early termination of the collective agreement now in effect between the parties as of June 12th, 1967, being two months from the date of this endorsement. The Board directs that copies of this endorsement be posted in conspicuous places on the premises of the employer in accordance with instructions to be issued by the Registrar.

7. *Canada Building Materials*, [1968] OLRB Rep. Mar. 1210, was a similar case in which parties to a collective agreement that was scheduled to expire in August of 1968 asked the Board for its consent to terminate the agreement in March -- thus, once again, eliminating the pending “open period” altogether. Objection to the application was raised and is set out in the following terms:

2. Notice of the application was posted pursuant to the direction of the Registrar of the Board and the intervener has objected to the application. The intervener filed with the Board three application for membership cards on behalf of three employees of the company applicant. Counsel for the intervener submitted that if consent was to be granted at all in this case the Board should not shut out the opportunity of the intervener to organize. Further he stated that the intervener had relied on the provisions of the Act with respect to the “open season” for the current contract between the applicants hereto and alleged that this should remain available to it where it has objected and submitted evidence of membership for employees in the bargaining unit involved.

The Board simply adopted the comments contained in the *National Cash Register* case, and again granted the early termination only on the basis that it would be effective two months from the date of the Board’s decision. To the same effect was *Standard Products (Canada) Limited*, [1969] OLRB Rep. Apr. 123, and the Board granted the application on precisely the same terms.

8. In the present case, the Board recessed to consider the foregoing case law and the submissions of the parties, and then delivered oral reasons for dismissing the application, as follows:

As Ms. Turtle has noted, parties to a collective agreement are given wide latitude to make amendments or adjustments to their collective agreement should they so choose. Section 52(5) of the *Labour Relations Act* makes that clear:

Nothing in this section prevents the revision by mutual consent of the parties at any time of any provision of a collective agreement other than a provision relating to its term of operation.

In addition to that one proviso, section 52(3) of the Act also stipulates:

A collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or this Act without the consent of the Board on the joint application of the parties.

That sole exception to the ability of the parties to order their own affairs reflects a clear policy on the part of the Legislature to preserve the two-month "open period" established by the statute for the bringing of representation applications. The requirement for Board consent is set out in the Act and is well known, as is the fact that what the Board effectively does is to act as an intermediary to ensure that notice of the parties' intention to alter the term of their existing collective agreement is posted in the workplace. That posting often produces no objection, and the Board grants its consent as a matter of course. Where it does produce an objection, however, it is difficult to conceive of a case where the Board *would* grant the early termination in a way that would abridge the rights initially guaranteed by the Act. Certainly the Board is unaware of any case to date that has done that; at best, the Board has sought to accommodate the interests of those seeking to implement a new collective agreement by moving the open period forward -- but that has always been done on advance notice to any interested parties, by way of the Board's decision in the application, and never for a period less than the two months that the legislators originally held to be appropriate.

Here the parties have only 10 days of the prescribed open period left to run. Or to put it conversely, as Mr. Fishbein has, any interested party already has had the benefit of 50 of the 60 days that the open period was projected by the statute to run. We are not prepared, however, to try to decide in each individual case whether "50" days should be considered to be "enough", or "40", or "30", or "20"; the "open period" chosen by the Legislature is specifically prescribed to be two months, and we are not persuaded that the intention of the Act would be met by a decision to shorten that period to something less.

2534-89-M; 2460-89-U Stelco Fastener & Forging Co., Stelco Inc., Applicant v. United Steelworkers of America, Local 3767 and 3749, Respondent v. Fred J. Zicard, Intervener; Fred J. Zicard, Complainant v. United Steelworkers of America, Local #3749, Respondent v. Stelco Fastener & Forging Co., Stelco Inc., Intervener

Collective Agreement - Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Employee objecting to early termination of collective agreement - Employee arguing Board should not decide early termination application until his fair representation complaint had been dealt with - Employee objecting to union handling of vote on employer's last offer - Employer threatening to shut down all three plants if concession package not agreed to for all locations - Union totalling votes from all 3 locations and agreeing to accept package - Union making honest "hard choice" - Union not obliged to take vote on acceptance of employer offer or to follow employee wishes - Union affirming early termination - Fair representation complaint not concerned with "open period" and not seeking matter relevant to Board's discretion - Fair representation complaint need not be heard first - Complaint dismissed - Early termination decision affirmed

BEFORE: S. A. Tacon, Vice-Chair, and Board Members D. A. MacDonald and B. L. Armstrong.

APPEARANCES: Fred J. Zicard on his own behalf as the complainant in Board File 2460-89-U and as intervener in Board File 2534-89-M; T. F. Storie, Ron Davidson and Brian Lisson for the applicant in Board File 2534-89-M and for the intervener in Board File 2460-89-U; Brian Shell, Marie Kelly and Ted Jez for the respondent in Board File 2460-89-U and Board File 2534-89-M.

DECISION OF THE BOARD; March 20, 1990

1. Board File 2534-89-M is an application submitted jointly by Stelco Fastener & Forging Co., Stelco Inc., (Stelco) and the United Steelworkers of America, Locals 3767 and 3749 (the U.S.W.A) requesting early termination of their collective agreements. Board File 2460-89-U is a complaint pursuant to section 89 of the *Labour Relations Act* alleging violation of section 68.
2. The joint application for early termination was processed by the Board in its usual way. Notices were posted on the premises of the employer indicating that anyone objecting to the Board's granting consent to the early termination should file such objection by January 26, 1990. No such objection was received by that date and, accordingly, the Board issued a decision consenting to the early termination. Subsequently, the Board received a letter from F. Zicard, a member of one of the bargaining units affected by the application, objecting to the early termination. That letter was sent to the Board by registered mail dated January 26, 1990 although it was not received until several days later. Mr. Zicard is also the complainant in the section 68 complaint.
3. It is useful to set out the letters which form the basis of the objection to the early termination of the collective agreements and the section 68 complaint respectively:

Registrar
Ont. Labour Relations Board
400 University Ave
Toronto Ont.

Dear Ms. Inniss:

I would like to object to the granting of an early dissolution of the collective agreement between Steffco (Stelco) and the U.S.W.A. Local # 3749. I have already initiated a complaint with your

office under Sect. 68 concerning this matter. I feel it would be inappropriate to grant this dissolution pending a finding on my complaint. The field officer handling my complaint is Mr. Wayne Davis and your file number is 2460-89-U.

Yours truly,

"F. Zicard"

• • •

Ontario Labour Relations Board
400 University Ave.
Toronto, Ontario
M7A 1V4

January 9, 1990

Dear Sir/Madam:

The vote in question was on a new collective agreement to last until July 31, 1993. Before the vote was taken, it was announced to the membership that unlike all previous contract votes this vote would have the votes of the two separate locals covering three plants combined as one result.

Not only is this an arbitrary union decision without historical precedent, it is contrary to the by laws of the local constitution and may cause an unwarranted influence on an individual's vote.

Thank you for your prompt attention to this matter.

Yours truly,

"F. J. Zicard"
Fred Zicard

4. Both matters were set down for hearing. Following the evidence (in the form of an agreed statement of facts and documentary material) and the submissions of the parties, the Board gave the following ruling:

The Board considers it appropriate in the circumstances to give its decision in the nature of a bottom line ruling with full written reasons to follow.

The Board has considered the submissions of the parties and the context of the facts as agreed, facts assumed true and provable and documentary material filed. The Board is not unsympathetic to persons who may feel aggrieved with circumstances in which they may be placed from time to time. However, the Board makes its decisions given the evidence and submissions with reference to the statutory language, including the purpose of the relevant sections, and the Board caselaw.

In this instance, the Board finds the objection with respect to the early termination request not a proper basis for withholding the Board's consent. While the Board treated the objection as timely rather than a "reconsideration", as the Board was not persuaded by the objection, the Board affirms its January 26, 1990 decision granting its consent to early termination.

With respect to the section 89 complaint, the Board does not find a breach of section 68 and dismisses this as well. As noted, full reasons for this decision will issue at a later date.

5. Here then are the Board's reasons for its decision.

6. It is undisputed that the company currently operates at three locations: Swansea, Burlington and Brantford (the old Brantford plant). There is a "new" facility to be located in Brant-

ford (referred to as the "new Brantford plant"). The complainant works at the old Brantford location.

7. The agreement on facts is next set out. The Board notes that, in some respects, the facts were agreed to or assumed true and provable for purposes of these proceedings only. Those caveats are noted *infra*:

- (a) The fastener division has experienced significant losses over a number of years, including a loss of \$11,000,000 in 1989. A number of recovery plans were examined and a business plan was ultimately approved subject to ratification by the two locals. That plan called for the expenditure of \$24,500,000 for new equipment in a new facility in Brantford, Ontario. As well, \$10,000,000 was earmarked for various Employee Assistance Programs and another \$15,000,000 for working capital.
- (b) On that basis, the company commenced negotiations with the union on October 31, 1989 which culminated in a final offer which was put to the membership. In all, approximately 25 meetings were held between the company and the union, including a mediation session on December 8, 1989. The final offer was tabled on December 19, 1989. At that meeting, the union specifically asked what the company's position would be if the package proposal was not ratified. The company responded that, without ratification of the entire package, all three facilities ["old" Brantford, Swansea and Burlington] would be closed with a loss of some 500 jobs and, further, there would be no new facility built in Brantford. Consistent with this statement, the company had delivered the notice of closure of all three plants, as required under the *Employment Standards Act*, on December 8, 1989.
- (c) The current collective agreements at the three locations were scheduled to expire on July 31, 1990. The agreement between the company and the union would terminate those three contracts effective November 30, 1989. The three "replacement" collective agreements would then terminate November 30, 1990 (Burlington), November 30, 1991 (Swansea) and November 30, 1992 (old Brantford). The terms and conditions of the "replacement" agreements were unchanged for the period of November 30, 1989 to July 31, 1990. Thereafter, until their respective expiry dates, the terms and conditions did differ in that what could be termed "concessions" took effect. As well, an "umbrella" collective agreement was negotiated in respect of the new Brantford facility to cover those workers who transferred from one of the three old locations over a period of time. The three original locations would be closed although not at the same time.
- (d) The employees at the old Brantford location were represented by USWA Local 3749; the employees at both Swansea and Burlington by the USWA Local 3767.
- (e) The final offer from the company was received by the union on December 19, 1989. Given the overlapping shifts, information meetings were held at the old Brantford location on December 20 at 4:00 o'clock p.m. and December 21 at 12:00 o'clock noon to ensure that all affected employees could attend. Only employees in the Brantford bargaining unit attended the meetings.
- (f) The local union executive and members of the negotiating committee explained the company's final proposal and how that differed from a earlier proposal of December 5, 1989. The union staff representative, Ted Jez, also attended; Jez was the principal negotiator for both locals in dealing with the company with respect to the three "replacement" collective agreements and the "umbrella" agreement. The format of the information meetings was "question and answer" rather than proceeding through the whole document as that was the preference of those in attendance.
- (g) The complainant attended the meeting at 4:00 o'clock p.m. on December 20, 1989. The complainant expressed his view that the deal should not come to the membership shaped in that fashion (i.e., as a "package"). In response, Jez explained his belief that, if the negotiating committee did not allow the membership to vote and the three

plants were closed as the company was threatening, the members would certainly complain to the union about the absence of an opportunity to express their views on the deal.

- (h) The union did not recommend that the members accept or reject the company's proposals. The union did express to the members in clear, certain terms that rejection would result in the closure of the three operations and no new Brantford facility would be built so that the membership would know precisely what was at issue. The union also explained that certain concessionary terms would come in effect at the old Brantford facility and the new Brantford location. It was explained that, following the changes, there would be four concurrent collective agreements, (i.e., one at each of the original locations and one at the new Brantford facility).
- (i) The local union bylaws in Brantford require a vote on the day following the information meeting so that everyone has an opportunity to consider the matter before voting. The voting at Brantford was held on December 22, 1989 from 6:15 a.m. to 7:15 a.m. and from 2:15 p.m. to 3:15 p.m.. December 22 was the last working day before the usual shutdown which commenced the following Monday.
- (j) The voting was by secret ballot with the following results. Of the 203 persons eligible to vote, 168 actually voted. Of those, 96 voted in favour of accepting the package proposal and 72 voted to reject, a plurality of 24 votes. Thirty-five persons did not vote in what was agreed was one of the most important votes in the local's history.
- (k) There was considerable talk at the old Brantford location that Swansea was getting a better deal from the package and, therefore, Swansea employees would carry the vote.
- (l) One employee eligible to vote at Brantford (Drago Lovasic) was of the view that his vote was worthless as the result would be carried by Swansea; he did not vote.
- (m) In the past, generally speaking, separate ratification votes were held and that vote was binding solely on each local. In respect of the December 1989 ratification votes, each location voted separately but the results were then combined to form one overall result.
- (n) Information meetings and ratification votes took place at the Swansea and Burlington locations as well. The votes at Brantford, Swansea and Burlington were each tallied separately and have been maintained separately since then. The respective tallies were combined for an overall result in favour of acceptance.
- (o) Following the ratification, the four documents were signed on January 12, 1990. One of the four was the "replacement" Brantford collective agreement affecting employees in the bargaining unit of which the complainant is a member. Another document covered the new Brantford fastener plant where employees in the old Brantford location (including the complainant) would have the opportunity to transfer with certain acquired rights (such as seniority) and where those employees would join with employees transferred from Burlington and Swansea.

8. Counsel for the union agreed to items (a) and (b) above for purposes of these proceedings. Further, counsel for the union and counsel for the company agreed to assume true and provable for purposes of these proceedings, items (k), (l) and (m) above. In all other respects, all parties agreed to the facts as stated.

9. It is not necessary to detail the documents filed in evidence on consent except to note the material includes the company's final proposal, press releases, information updates from the company to the employees in the three locations, information updates from the union to the employees in the three locations and the notice of closure of the three locations in accordance with the *Employment Standards Act*.

10. The Board next sets out the representations of the parties in a highly abbreviated form.

11. The complainant opposed the early termination of the Brantford collective agreement, as a member of that bargaining unit, because of the manner in which the vote was conducted. That is, he asserted the vote results from the three locations should not have been combined for an overall result to ratify the “replacement” collective agreements and the “umbrella” collective agreement covering the new facility in Brantford. His objections remained notwithstanding that the votes were initially tallied in each respective location and, in his location, Brantford, the vote was in favour of ratification. The complainant submitted that the deal should not have been presented as a “package”. In the complainant’s view, such a voting procedure had not been utilized before and contravened section 68 of the Act. It was argued that the union had received its authority to terminate the Brantford collective agreement (Local 3749) through an improper vote which then tainted the union’s subsequent conduct. Moreover, the complainant contended that the contents of the replacement and the umbrella collective agreements disproportionately favoured employees at the Swansea location and, as it was felt the Swansea employees would carry the vote, individuals at Brantford may not have voted out of a sense of futility. As a remedy, the complainant submitted a new vote should be directed in each plant covered by a separate contract and that each vote be binding on that particular local only. With respect to the issue of timeliness, the complainant argued, in reply, that the relevant date was not October 31 (the date of the first company proposal) but the ratification on December 22, 1989 and there was no undue delay between then and the filing of the complaint by the complainant (a layman unfamiliar with Board procedures) on January 26, 1990.

12. Counsel for the company asserted that the complainant was actually objecting to the procedure adopted by the union for ratifying the new collective agreements. Counsel contended the union’s constitution and bylaws made the conduct of a vote and whether there was a vote discretionary and, hence, there was no cause of action stated in the section 68 complaint. In this regard, it was noted that the union’s conduct had resulted in the preservation of many jobs and enhanced retirement/severance packages for employees beyond their entitlement under the *Employment Standards Act*. As well, it was argued that the objection to the early termination and the related section 68 complaint were untimely. That is, the sequence of events, of which the complainant was fully aware, had commenced on October 31, 1989 and was concluded on December 22, 1989 with the ratification of the collective agreements; based on the voting results, the company had committed millions of dollars. Thus, it was asserted the prejudice to the company of the delay in the instant case was substantial. Further, counsel argued that the jurisprudence dealing with section 52(3) confirmed that, in deciding whether to grant early termination of a collective agreement, the Board focused on the presence or absence of another trade union which was seeking to organize the affected employees. That is, early termination of the collective agreement should not be granted where to do so would be to deprive another union of the “open period” in which to test the representational wishes of the affected employees. In this instance, it was submitted, there were no such concerns and the objection should be dismissed. Finally, counsel asserted that the Board did not have the authority to direct a “separate” vote at the three locations or at the Brantford location alone as that format for approval of the company’s substantive proposal for closing the three locations and opening a new facility had never been acceptable to the company. Cases cited in support included: *Brantford General Hospital*, [1966] OLRB Rep. July 269; *Standard Products (Canada) Limited*, [1969] OLRB Rep. Apr. 123; *The Continental Group of Canada Ltd.*, [1980] OLRB Rep. Oct. 1381; *The National Cash Register Company of Canada Limited*, [1967] OLRB Rep. Apr. 90; *Canada Building Materials Limited, Woodbridge, Ontario*, [1968] OLRB Rep. Mar. 1210; *Silverwood Dairies Limited, Brantford Branch*, [1967] OLRB Rep. Jan. 837; *Canada Forgings*, [1982] OLRB Rep. Jan. 50.

13. Counsel for the union adopted the submissions of company counsel with respect to the circumstances in which the Board would refuse a request for early termination, i.e., to preserve the "open period", and contrasted those situations with the instant case wherein the complainant's objection went to the content of the replacement collective agreements and the umbrella agreement and the manner in which the union canvassed the membership. In counsel's view, the union could lawfully have conducted a vote on the package and acted in accordance with that vote outcome or not, or the union could have unilaterally determined whether or not to accept the company's offer. That is, there is no obligation in section 68 to conduct a vote in the circumstances provided the union's decision to act in a specific manner was not arbitrary, discriminatory or in bad faith nor is there an obligation to conduct a vote prior to bringing a joint application under section 52(3) for early termination of the collective agreement. Counsel reviewed the evidence and asserted the facts as agreed did not support a conclusion that the union had breached section 68. With respect to the issue of delay and prejudice, counsel stressed that the commitment of those millions of dollars increased the prospects of employment for many workers and, for those not transferring, provided enhanced severance and early retirement packages. Counsel noted that the relief requested was a Board directed new vote in each plant and submitted there was no basis for such an order. Finally, counsel argued that there had been no violation of the union's constitution nor had charges been laid pursuant to that constitution and, in any event, such matters were internal union affairs, implicitly, beyond the Board's jurisdiction. Cases referred to included: *The Continental Group of Canada Ltd.*, *supra*; *John Daniell*, [1987] OLRB Rep. July 990; *Don Roe*, [1986] OLRB Rep. Oct. 1429; *Lilo Rail of Canada Limited*, [1983] OLRB Rep. Sept. 1496; *Governing Council of the University of Toronto*, [1982] OLRB Rep. Dec. 1964.

14. The Board first deals with the alleged violation of section 68 of the Act, which reads:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

15. It is well-settled Board jurisprudence that the duty of fair representation encompasses both the administrative and negotiation phases of the collective bargaining relationship. In balancing the various competing interests, the union is required to turn its mind to the relevant issues. However, in doing so, the union is free, as the exclusive bargaining agent of the employees in the bargaining unit, to decide upon those strategies which it concludes best serve its collective bargaining interests. It is only if its decision flowed from improper motives (bad faith, discrimination) or could be characterized as arbitrary that the union will run afoul of the duty of fair representation contained in section 68 of the Act. The union is not required to put its proposed course of action to the membership nor, if it does so, is it bound to follow the express wishes of those members; see, for example, *John Daniell*, *supra*; *The T. Eaton Company Limited*, [1985] OLRB Rep. Aug. 1309; *Lilo Rail of Canada*, *supra*. The Board notes, parenthetically, that it is not here dealing with union counsel's argument as to the binding affect or otherwise of a vote directed pursuant to section 40(1) of the Act.

16. In the instant case, the union clearly turned its mind to the issues involved in the early termination of the various collective agreements and the negotiation of replacement contracts and the "umbrella" contract for the new Brantford location. A series of negotiating meetings were held with the company which culminated in the company's final offer. That offer presented the union with a Draconian choice. Acceptance of the offer would likely save many jobs and provide an enhanced severance and retirement package for those employees not transferring to the new Brantford location, notwithstanding that some of the other provisions in the proposal were not to the union's liking. Rejection of the offer would, in the union's view, result in the immediate

closure of the three existing locations and no new facility would be built. The union concluded that the company was not bluffing. In the circumstances, that conclusion was eminently reasonable. The union informed the members of the various bargaining units of the options and the implications of accepting or rejecting the company's final offer. Indeed, the membership had been kept informed of the negotiations throughout. The union then determined the choice should be made by the members themselves in a series of ratification votes on the "package" at the three locations. The "vote" encompassed both the early termination and the company's replacement package. The complainant appeared to assert that the question of the early termination and the acceptance or rejection of the company's substantive proposal should have been separate. The Board disagrees. The reasoning in *Lilo Rail, supra*, wherein the form of the ballot giving the members the choice between ratification and strike was found not contrary to section 68 is adopted as analogous and persuasive.

17. The union also determined that the ballots would be counted in each location and then an overall tally would be announced. The Board sees nothing improper in such a procedure given the peculiar circumstances in which the three locations would be shut down and some employees transferred from each location to the new Brantford plant to work under a common "umbrella" collective agreement. The vote at the old Brantford location was 96 in favour and 72 against; 35 persons did not vote. The complainant asserted that this result flowed from the failure to vote by some of the employees because of a concern that the results at the Swansea location would "sweep" the votes overall. The agreed statement of facts reveals: (a) that there was considerable talk at the old Brantford location that Swansea was getting a better deal from the package and, therefore, Swansea employees would carry the vote; (b) that one employee eligible to vote at Brantford was of the view that his vote was worthless as the result would be carried by Swansea; he did not vote. On the facts agreed or assumed true and provable for purposes of these proceedings, the Board is not persuaded that the union did anything contrary to its duty of fair representation. The employees at the old Brantford location all had the opportunity to vote; the choice put to them was "informed and realistic", to use the phrase of *Lilo Rail, supra*. That some employees chose not to exercise their franchise does not taint the union's manner of proceeding.

18. The overall tally at the three locations was to accept the company's proposal. The Board has already expressed its view that the union is not bound by the results of such a vote provided its decision not to do so is based on relevant collective bargaining considerations, but that situation need not be explored further herein as the union, in the instant case, followed the wishes of the membership and signed the several collective agreements.

19. Thus, for the foregoing reasons, the Board finds that the union has not contravened section 68 of the Act.

20. The Board next turns to the objection by the complainant to the early termination of the collective agreement pending a finding on his section 68 complaint. The jurisprudence focuses on the necessity to preserve an open period where any person or organization having an interest objects to that early termination in order to give effect to the statutory scheme which establishes defined open periods in which the employees' representation rights may be tested: *Canada Building Materials, supra*; *National Cash Register Company, supra*; *Standard Products (Canada), supra*. In each of these cases, a trade union intervener objected to the early termination of the collective agreement between the company and the incumbent trade union and the Board's consent to the early termination was structured so as to preserve a two month open period. Recently, the Board has reviewed and confirmed that jurisprudence, stating, in part, from its oral ruling:

As Ms. Turtle has noted, parties to a collective agreement are given wide latitude to make

amendments or adjustments to their collective agreement should they so choose. Section 52(5) of the *Labour Relations Act* makes that clear:

Nothing in this section prevents the revision by mutual consent of the parties at any time of any provision of a collective agreement other than a provision relating to its terms of operation.

In addition to that one proviso, section 52(3) of the Act also stipulates:

A collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions of this Act without the consent of the Board on the joint application of the parties.

That sole exception to the ability of the parties to order their own affairs reflects a clear policy on the part of the Legislature to preserve the two-month "open period" established by the statute for the bringing of representation applications. The requirement for Board consent is set out in the Act and is well known, as is the fact that what the Board effectively does is to act as an intermediary to ensure that notice of the parties' intention to alter the term of their existing collective agreement is posted in the workplace. That posting often produces no objection, and the Board grants its consent as a matter of course. Where it does produce an objection, however, it is difficult to conceive of a case where the Board *would* grant the early termination in a way that would abridge the rights initially guaranteed by the Act. Certainly the Board is unaware of any case to date that has done that; at best, the Board has sought to accommodate the interests of those seeking to implement a new collective agreement by moving the open period forward -- but that has always been done on advance notice to any interested parties, by way of the Board's decision in the application, and never for a period less than the two months that the legislators originally held to be appropriate.

(see *Ridgewood Industries*, Board File 2249-89-M, March 9, 1990, as yet unreported).

21. The jurisprudence, however, has also recognized that not all objections to the early termination of a collective agreement go to the principle of the "open period" in which to test representational wishes as enshrined in the statute. In *Brantford General Hospital*, *supra*, a number of employees objected to the "adequacy of the notices given by the union with respect to a meeting of employees called by the union to consider the proposals of the employer and to the nature of the proceedings at that meeting". The Board found that "the objections raised in the instant case do not go to those matters which the Board deems its advisable to consider in determining whether to exercise its discretion under [then] section 39(3) [now 52(3)] of the Act". Subsequently, in *The Continental Group of Canada*, *supra*, the Board commented:

4. The employer has filed a declaration indicating that the proper notices were posted. Presumably in response to the postings, the Board has received an objection to the application in File No. 1254-80-M from Mr. Robert Hall, who would appear to be an employee in the relevant bargaining unit. The basis of Mr. Hall's objection is dissatisfaction with the new terms and conditions of employment which the employer intends to implement, with the agreement of the union, following the termination of the existing agreement. There is nothing before the Board to suggest that Mr. Hall or any other employee seeks to challenge the union's position as bargaining agent, and as we have already noted, the purpose of the restriction in section 44(3) [now 52(3)] is to prevent the parties from undermining the right to make a representation application during the open period. This is "the mischief" to which section 44 [now 52] is directed, and there is nothing before the Board to suggest that this "mischief" exists in the present case. Accordingly, we are satisfied that the Board should grant its consent to early termination of the parties' agreements.

22. In the Board's view, the reasoning in *The Continental Group* case is particularly apposite. In the instant case, the applicant objects to the format of the ballot as a "package" proposal and objects to the voting procedure in which the results were counted at each location but then were combined into an overall tally for or against acceptance of the company's proposal. It appears

that the complainant, to some extent at least, objects to the substantive provisions in the proposal as well, given his view that the "deal" would prove of greater benefit to the Swansea workers. None of those sorts of concerns, in the Board's opinion, should be taken into consideration by the Board in determining whether or not to grant its consent to the early termination of the union collective agreements. Nor is the complainant's request that consent be deferred until his section 68 complaint is determined an appropriate factor in the Board's assessment. There is no suggestion that the complainant wishes to test his representational rights or is challenging the union's role as exclusive bargaining agent. The Board concludes, then, that this is an appropriate case in which to grant its consent to the joint application of the union and the company for early termination of their collective agreements. In so finding, the Board is not suggesting that the complainant acted for any motives other than his belief that the union's manner of proceeding was improper.

23. Given the Board's dismissal of the section 68 complaint and the granting of the Board's consent to the early termination (expressed as a confirmation of its consent given earlier, (see paragraph 4 above)), the Board need not expressly deal with the argument of company counsel that the matters should be dismissed because of delay and the resulting prejudice to the company if the matters proceeded. Nor need the Board deal further with the assertion of company counsel that the Board was without jurisdiction to grant the remedy requested by the complainant in the section 68 complaint.

24. The Board, as noted in its oral ruling, and for the foregoing reasons, dismisses the section 68 complaint and grants its consent to the early termination of the various collective agreements as per its January 26, 1990 decision.

1644-89-U Ted Stothers and Bruce Skreptak, Complainants v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local 128, Respondent v. Hydra-Dyne Industrial Cleaning Services Ltd., Intervener

Abandonment - Bargaining Unit - Duty of Fair Representation - Unfair Labour Practice - Union and employer agreeing to exclusion of casual employees from collective agreement coverage in 1985 - Complainants employed as casuals in 1986 and 1987 - Complainants earning less than if covered by agreement and complaining of breach of duty of fair representation - Board dismissing complaint - Union abandonment of casual representation rights occurring before employment of complainants - Complainants not employees in bargaining unit which union continued to be entitled to represent - Abandonment of part of bargaining unit not *per se* breach of fair representation duty where not arbitrary, discriminatory, or in bad faith - Union estopped from asserting representation rights in any case

BEFORE: *K. G. O'Neil*, Vice-Chair.

APPEARANCES: *Lyle F. Curran, Bruce Skreptak and Ted Stothers* for the complainants; *David McKee, Joe Maloney and Michael McCabe* for the respondent union; *Joe Dynes* for the intervener.

DECISION OF THE BOARD; March 12, 1990

1. This is a complaint under section 68 of the Act.
2. The complainants were employed by the intervener (referred to as Hydra-Dyne or the employer in this decision) between February 1986 and October 1987. They allege that the collective agreement between the union respondent (referred to as "the union" or "the Boilermakers" in this decision) and Hydra-Dyne covered them and that the union consented to the employer's failure to apply it to them in breach of its duty of fair representation. The employees would have earned substantially more money at the union rate of pay than what they were paid by the employer; they claim the difference as remedy. The employer and the union agree that these two employees were part of a list of casual employees who had always been outside the collective agreement. It is common ground that dues have never been deducted from the complainants' pay, nor the collective agreement applied to them in any way.
3. At the outset of the hearing, the union moved for dismissal of the complaint on the basis of delay. The complainants' last work for Hydra-Dyne was in October of 1987. The complainants allege that as of May 1986 they both ought to have been treated as within the bargaining unit, having worked long enough to be admitted to the union if they were covered by the collective agreement. However, the union alleges it heard nothing definite of the complaint until April 3, 1989 at which time it was served with notice of a statement of claim in a civil court action suing for the difference between the rate paid to the complainants and the union rate. That action was stayed pending this Board's determination of the matter. The Board dismissed the union's motion orally at the hearing indicating that despite the lengthy delay, which would be taken into account in the fashioning of a remedy, if any, it would exercise its discretion to hear the complaint given the allegation that the complainants were intentionally misled as to their rights by the respondent.
4. Hydra-Dyne operates a high pressure water cleaning business in what the parties refer to as "Chemical Valley" in Sarnia. It is the successor to a number of previous corporate entities. Joe Dynes, President of Hydra-Dyne, has worked in the high pressure water industry since 1967 when he started as a casual labourer. In this capacity he worked 80-hour weeks but was not covered by the collective agreement in place for full-time employees.
5. Mr. Dynes was a manager for Vacuum Industrial Pollution Industrial Inc. (sic), ("VIP"), Hydra-Dyne's immediate corporate predecessor in late 1984 when it went into receivership. He arranged to keep the business going and rented VIP's trucks, commencing operation as Hydra-Dyne Industrial Cleaning Services Ltd. He voluntarily became the successor employer to VIP's collective agreement.
6. VIP had been the successor to the first collective agreement in evidence, between Vacuum Anchor Corporation ("Vacuum Anchor") and the International of the Boilermakers, effective from April 13, 1981 to April 12, 1983. By way of a January 30, 1984 related employer declaration this collective agreement bound VAC Services, Division of 464555 Ontario Limited ("VAC"). Prior to the hearing of a section 63 application VIP and the union agreed that VIP was the successor to VAC. This agreement is recorded in an unreported decision of the Board dated August 28, 1984, Board File No. 1156-84-R.
7. Wages for the years 1983-84 were dealt with by way of an Appendix attached to a signature page dated April 22, 1983 signed by the principal of VAC and the Boilermakers, Lodge No. 128. The union party to both the related employer declaration and the agreement which bound VIP is Local 128 of the Boilermakers whereas it was the International which signed the Vacuum Anchor agreement. No issue was made of the different naming of the union party and there is no question that from the date of the above signature page, April 22, 1983, the relevant union party was Local 128 and not the International. Appendix "A" to the signature page provides a wage

schedule for various classifications (identical titles to those in the agreement with Vacuum Anchor).

8. Mr. Dynes received the following letter dated February 14, 1985 from union counsel:

We are solicitors to the International Brotherhood of Boilermakers', Ironship Builders, Blacksmiths, Forgers & Helpers.

Mr. McManus has asked me to inform you that pursuant to our Collective Agreement with your company, casual labour is not recognized. Be advised that all employees covered by the Collective Agreement must have their vacation pay deducted at source and remitted to the Administrator for the Boilermakers' Health, Welfare and Vacation Pay Trust Funds.

Mr. McManus also informs me that the Company is now operating under the business style of HYDRODYNES.

Be advised that pursuant to the Labour Laws of the Province of Ontario, Hydrodynes and V.I.P. International Inc., are deemed to be one and the same for the purposes of our Collective Agreement. For greater certainty we wish to inform you that Hydrodynes or any other company carrying on related or successorship business with or for V.I.P. International Inc. is bound to the full terms of our Collective Agreement.

Mr. Dynes contacted Mr. McManus, the union's International Representative, and told him that he had agreed to successorship so they could go ahead with the contract he had just gotten and that he could not function without the "casual - collective agreement split". Mr. McManus agreed to put the question to the membership "to continue as it had been before." To Mr. Dynes this meant a group was under the collective agreement and a group was on a casual basis. He acknowledged that casuals do the same work as those paid the rate under the collective agreement. He maintains he referred to no particular document in making these arrangements with Mr. McManus; he was strictly interested in the "bottom line" so he could get on with business.

9. We note there is no evidence before the Board to base a conclusion that any improprieties and/or crimes committed by Mr. McManus and/or Mr. Mott (the principal of VAC and Mr. Dynes' former employer) affected this matter, despite the suggestions of counsel for the complainants in cross-examination. The possibility of fraud on the part of the union and himself was also put to Mr. Dynes in cross-examination. He denied these allegations, defending the different treatment of the complainants and others on the list of casual employees on the basis of the practice in the industry. Mr. Dynes himself worked four years in the business before being "let into the union."

10. On January 21, 1986, Joe Maloney took over from Mr. McManus as International Representative and became responsible for Local 128. Mr. Dynes told Mr. Maloney that things would have to continue "the same as in the past in order [for him] to survive." They reached an agreement to have a wage reduction of twenty-five cents per hour for a year which was voted on by the union membership. Some time after this Mr. Maloney became aware that there was an industry practice to work with two groups, one organized and one not. He had nothing to do with the latter. When asked in cross-examination what a full-time employee was (as opposed to a casual), he answered, "whichever the company hires as full time."

11. The next written evidence of a collective agreement is entitled "Memorandum of Settlement" between Hydra-Dyne and Local 128 running from February 1, 1987 to January 31, 1990. With the exception of minor changes not relevant to this dispute the pertinent portions of the Recognition, Scope and Union Security Clauses are identical to the collective agreement with Vacuum Anchor and provide as follows:

ARTICLE ONE RECOGNITION

- A) The employer agrees to recognize the Union as the sole bargaining representative for all its employees which will include but not be limited to Hydra-Blast Technicians and Vacuuming Technicians Trainees employed within the scope of this work save and except office and sales staff, foreman and those above the rank of foreman, engineers and time keepers.
- B) The company agrees to recognize the Water and Vacuum Council of Trade Unions as bargaining agent for the employees covered by the terms of this agreement as described in paragraph ONE (A). This provision will take effect upon receipt of written notice from the officers of Local 128 to the company, only after the members covered under the terms and conditions of this agreement shall ratify by way of vote, then duly transfer such authority to the said council.

ARTICLE TWO SCOPE

- A) This agreement shall apply in respect to all Hydra-Blasting work performed by the Employer; also on all Vacuum work done by the Employer and any maintenance of equipment involved with the above mentioned work by the employer or by any person, firm or corporation owned by the company or financially controlled by the Employer in Canada.
- B) This agreement shall cover all areas of work except that which fall within the field of Boilermaker's jurisdiction. For example, on Building Trades jobs, the opening and closing of towers, drums and any internal work; also loading of Catalyst, ect. [sic] is work done by field Boilermakers from Lodge 128 in the area in which the work is being done.

ARTICLE THREE UNION SECURITY

- A) The employer agrees to employ as employees members of the union in the performance of all work within the scope of this agreement. The employer will deduct from the first pay period of each month, union dues covering all employees engaged on work coming within the scope of this agreement; also initiation fees, or reinstatements covering new employees and promptly remit same together with a list of names of the employees whose union dues, initiation fees or reinstatements are so deducted to the Secretary Treasurer of Local 128.
- B) The union dues remissions required shall be remitted not later than the 15th day of the following month and shall be accompanied by the official forms and include all employee's social insurance numbers.
- C) The employer shall be entitled to hire and train persons for work as Technicians or Trainees although such persons may not at the time of hiring be members of the union. The technician shall be initiated into the union within (10) ten days of hiring and all deductions under this agreement shall apply. The Probationary Member (Trainee) will have a ninety (90) day probationary period after which he will be initiated into the union and all deductions under this agreement shall apply.
- D) All parties agree that during the life of this agreement there will be no strike or lock out.

Wages are dealt with in Appendix A with a list of classifications which is shorter and different from, but apparently comparable to, that in the collective agreement with Vacuum Anchor. Mr. Dynes considered it an extension of the "existing" contract from VIP.

12. Mr. Dynes testified that during discussions which resulted in the '87-'90 agreement the conversation about casuals was that "they would all remain the same except the wages." In Mr. Dynes' view, there was no limit on his right to engage casual employees. However, Mr. Dynes

claims never to have read the entire agreement, including the union security clause, since his main concern was the wage rate and the documents had been in the hands of the R.C.M.P. for some period of time during its investigation of Mr. Mott's activities.

13. The cleaning equipment used in the employer's business is operated from a truck with two people; the lead hand is the more experienced of the two on the truck. The classification of lead hand is dealt with in both the agreement with Vacuum Anchor and Hydra-Dyne by payment of a premium of 50 cents per hour. Both complainants started as apprentice-mechanics for Hydra-Dyne and later became lead-hands for which they received an hourly premium of 50 cents over their regular rate of pay, which, as noted above, is much lower than the union rate. The complainants had been aware of the differential since early on in their employment with Hydra-Dyne. Messrs. Stothers and Skreptak complained to Dynes about their pay, asking for more, and he gave them increases on unspecified dates.

14. The complainants, as well as most others doing the same work for the employer, worked on call with no regularly scheduled hours. When Mr. Dynes obtains a job he calls people in to work from two phone lists. He calls everybody who is "covered by the collective agreement", who are listed in order of seniority, before he goes to the casual list. With the exception of one major client who requires two men on a daily basis, all the work is call-in. The call-in system is used because there are great fluctuations in the volume of work and very little notice when a job does come in.

15. Bruce Skreptak thought that the process for getting into the union under the 1986 contract was to be voted in but "they were not doing it then." He also heard that at the time of the 1987 contract negotiations five men were to be admitted to the union. After it was signed a number of the union men informed him he would not be getting into the union. Mr. Skreptak had also worked for VAC and then VIP under Mr. Dynes in 1983 - 1984 as a "non-union man". He left that job before he had what he considered enough hours to get into the union. It was his impression from co-workers that it was a just matter of time before he would be initiated into the union.

16. After hearing from fellow employees in the spring of 1987 that they were not going to be "let in" to the union Mr. Skreptak and Mr. Stothers went to see Mr. Maloney at the union hall. The complainants' desire to talk to Mr. Maloney was partially prompted by "talk" that they were going to have to pay union dues. The complainants wanted to tell Mr. Maloney that they would not pay union dues unless they were covered by the collective agreement.

17. There was a fair amount of conflicting evidence about conversations between the complainants and union representatives. It is not necessary to set it out in detail here. What is important in the view I take of this matter is that the complainants made themselves and their situation known to the union and asked to join; it never took the position it represented them. That much was common ground.

18. In the Spring of 1987 subsequent to the meeting of the complainants and Mr. Maloney, Joe Dynes talked to Messrs. Skreptak and Stothers in the dispatch office saying that he would have to close shop if they were going to be oriented into the union, that he could not afford to pay the union rate to non-union men. Dynes told them they should not try to get into the union - that they would not be successful.

19. Michael McCabe took over Maloney's job in the summer of 1987. Mr. Stothers went to see Mr. McCabe "to see the contract and go over it." Mr. McCabe explained to Mr. Stothers his understanding that he was a casual employee, and that he had not been hired on a full time basis. Mr. McCabe spoke to Mr. Maloney a day or two later and had the files sent down with a copy of

the collective agreement which he did not have when he spoke to Stothers. He did not do anything about Stothers after that. Mr. McCabe testified that the understanding in the industry was that casuals were hired on for temporary peak periods.

Argument

20. Counsel for the complainants argues that nothing could be more clearly discriminatory under section 68 than an arrangement sanctioned by the union whereby there are two groups of employees, one subject to the collective agreement and the other subject to whatever the employer says. He submits that the union made a deliberate decision to tell the complainants that they were not entitled to the benefit of the collective agreement when it knew they were so entitled. The fact that it appears to have been done with the knowledge of the other union members means they should share the responsibility for this deliberate course of conduct. Counsel maintains that is clearly illegal for the union to ignore the union security provisions as was done here. He dismisses the notion that this can be considered a case involving serious delay in that the union intentionally misled the complainants as to their rights. The complainants then found it difficult to get assistance as they were advised to deal with their union first. He submits that this is not the type of delay that should bar remedy.

21. Union counsel characterizes the case as one in which there is no duty to represent these men as the union is not entitled to represent them. He submits the threshold conditions of section 68 have not been established. Further, he submits that the evidence of a course of conduct between the union and a series of companies shows that this bargaining unit does not include the group of people known as casual. The fact that the complainants have worked enough hours to be initiated into the union if they were covered does not make them covered by the collective agreement, particularly after the 1985 letter in which the union raised the issue and then dropped it. It is clear that both parties understood that the collective agreement did not apply to these employees. Since a certificate merges in the collective agreement, the bargaining rights extant are those in the most recent collective agreement. Regardless of the wording of the collective agreement these parties are agreed that these employees are not covered; they are free to organize. Counsel submits that it is particularly understandable in an industry with a very fluctuating workload that there would be a core group of employees, with the casuals separate and apart.

22. Counsel distinguishes *Consolidated Fast Frate Limited*, [1984] OLRB Rep. May 691 on the basis that the union in that case had taken money from and negotiated on behalf of the employees, neither of which facts pertain in this case. The union's position is that there is no unfairness here. The union never held out it was doing anything for these men; it is not a case where they took from them and gave nothing in return.

23. Additionally, counsel argues that even if the union had ever been entitled to represent casuals (and there is no evidence of that) the most that can be said is that the union has abandoned its bargaining rights, which has never been treated as an unfair labour practice by the Board.

24. In the alternative, the union takes the position that if a duty existed, there was no breach because the complainants did not pursue their complaint with the union in an effective manner. Counsel maintains that all the complainants asked the union was if they could get into the union. Further counsel argues that the complainants have represented to the union by their course of conduct between the summer of 1987 and April 1989 that they have no complaint - that there is nothing they want the union to do.

25. In any event, it is argued, the interpretation taken by the union of the collective agreement was not perverse in the light of nine years practice to the contrary. The union did direct its

mind to the relevant issue: were these men in the bargaining unit. If the union is incorrect in its understanding of the current composition of the bargaining unit, that is the worst that can be said. It is wrong, not arbitrary, discriminatory or acting in bad faith.

26. Counsel submits it would be necessary to find that a properly filed grievance on these employees' behalf would have been successful to give them the remedy they seek. He submits that the employer would have had good reason to raise an estoppel argument which would have run at least the course of a collective agreement.

27. Mr. Dynes submitted that if the arrangement with the union had been working for all these years and throughout the industry he had no reason to "assume anything different".

28. Complainants' counsel argues in reply that since there is no ambiguity in the wording of the collective agreement the past practice is of no assistance to the union. He submits that the parties to a collective agreement cannot have a deal the employees cannot see. The union should not be allowed to say it will not enforce the collective agreement.

Decision

29. The first question to be answered is whether there was a duty owed by the union to the complainants under section 68. This requires a finding as to whether the union continued to be entitled to represent the complainants in a bargaining unit.

30. A union becomes entitled to represent employees in a bargaining unit either by certification or voluntary recognition. In either case, once the union has concluded a collective agreement with an employer, it is that document which defines the bargaining unit which the union represents. The evidence establishes that the union and employer were bound by successive collective agreements which covered the entire period of the complainants' employ, with recognition and scope language as set out above. That language, on its face, communicates not only coverage of all employees, but also of all work of the sort performed by the complainants. The recognition, scope and wage classification provisions use language which, in the absence of other evidence, would mean that the complainants were covered by the collective agreement while they were working for Hydra-Dyne. Thus, on an interpretation of the wording of the collective agreement, I would find that the complainants were covered by the collective agreement and should have had dues deducted, in the absence of other evidence.

31. However, there is other evidence. That further evidence establishes that the union had abandoned any rights it may once have had to represent casual employees, and that it did so long before the complainants' employment with Hydra-Dyne. Thus, during their employment with Hydra-Dyne, Messrs. Stothers and Skreptak were not employees in a bargaining unit which the union continued to be entitled to represent. Consequently, they were not owed a duty under section 68. In coming to this conclusion I have assumed, without finding, that the union was once entitled to represent the employees on the casual list. (Although there is no evidence that the union was ever entitled by certificate to represent the casual employees, the broad "all employee" language suggests it may have been so entitled by certificate or voluntary recognition and the 1985 letter from counsel indicates that the union was taking the position it was. Another possibility is that the union never had such rights. The union and the employer may never have intended to cover casuals, but created a latent ambiguity by using the words "all its employees" to mean all its non-casual employees. See *Delphis W. Vandette*, [1988] OLRB Rep. Feb. 215.)

32. The statutory provisions dealing with termination of representation rights by the Board contemplate the expression of the wishes of the employees as to whether they do or do not wish to

continue to be represented by a union. However, it is not essential to have the majority consent of employees in the bargaining unit for a union to cease being entitled to represent them. Under the circumstances in which section 57(5) applies, for example, a union need only inform the Board that it does not desire to continue to represent employees in a bargaining unit for the Board to be enabled to grant an application for a declaration that the union no longer represents the employees in that bargaining unit. Similarly, a union can abandon bargaining rights by failing to exercise them. On a finding of fact by the Board that bargaining rights previously existing have been abandoned, the union is found to have lost the right to represent the employees in a bargaining unit by its own unilateral action or inaction. See among others, *Re Carpenters' District Council and Hugh Murray (1974) Ltd.*, 125 D.L.R. (3d) 568.

33. After Mr. McManus and Mr. Dynes came to their understanding as a result of union counsel's 1985 letter, it is clear that the union had decided not to exercise any rights it may have had to represent the casual employees. Moreover, the union's total inactivity on behalf of the employees on the casual list prior to that point would undoubtedly have warranted a finding of abandonment prior to the 1985 letter. The letter appears to have been a brief attempt at resurrecting the right to represent these employees. However, having failed to pursue the matter for another two years after this by the time the complainants raised the issue with the union in 1987, the union has demonstrated a complete failure to assert bargaining rights on behalf of the casuels.

34. Although most of the cases of abandonment in the Board's jurisprudence involve an entire bargaining unit, the Board has also found abandonment of part of a bargaining unit. In *York-Finch General Hospital*, [1987] OLRB Rep. April 641, the union had negotiated language describing a bargaining unit which did not exclude part-time employees. The Board found that the 1974 certificate and successive collective agreements included part-time employees in their scope, but that the collective agreement had never been applied to part-time employees. At various times from 1977 onward the union raised the issue but took no steps to enforce any rights they may have had pertaining to part-time employees. The Board cited the following excerpt from *J. S. Mechanical*, [1979] OLRB Rep. Feb. 110:

4. Over the last 20 years the principle of abandonment has been deeply entrenched in the Board's jurisprudence. Once a union has obtained bargaining rights either through certification or voluntary recognition it is expected that it will actively promote those rights. If a union declines to pursue bargaining rights it may lose them through disuse. Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, but once the Board is satisfied that a union has failed to preserve its rights, the union may no longer rely on them....

5. In assessing the bargaining relationship between the union and the employer to determine whether or not a union has abandoned its bargaining rights, the Board considers various factors. Among other possible indicators, the Board looks to the length of the union's inactivity, whether it has made attempts to negotiate or renew a collective agreement, whether the union has sought to administer the collective agreement through the grievance and arbitration provisions in the collective agreement, whether terms and conditions of employment have been changed by the employer without objection from the union as well as whether there are any extenuating circumstances to explain an apparent failure to assert bargaining rights.

It is apparent that considering these or any other indicators, the Boilermakers have failed to assert bargaining rights on behalf of the casuels. Thus, any such rights which they may have had have lapsed and neither they nor the complainants can rely on them.

35. This is how the Board has treated the non-enforcement of bargaining rights in most of the relevant jurisprudence. An exception is *Day & Campbell Ltd.*, [1964] OLRB Rep. May 85, where on a displacement application the applicant argued abandonment because the collective

agreement had never been applied to a group of stationary engineers who were covered by the language of the collective agreement. Based on considerations of unfairness to the employer party to the collective agreement, a majority of the Board said it would be unthinkable to allow the respondent union to unilaterally abandon all or any part of its bargaining rights during the life of the subsisting collective agreement. Even if this line of thinking had been adopted in later Board decisions, there is simply no evidence before me that the original abandonment of any bargaining rights for casual employees the Boilermakers had was not at a point when a subsisting collective agreement had expired. Any unfairness to the employer in this case would be in enforcing rights that he, too, considered non-existent.

36. This is not to say that abandonment is an absolute defence to a complaint of unfair representation. If a union abandons its rights to represent a group of employees in a manner which itself is arbitrary, discriminatory or in bad faith, abandonment may not be an answer to a complaint under section 68 by a member of that group at the time of the abandonment. Notionally at least, at the very point in time when the union says it is abandoning its representation rights, it is still entitled to represent those for whom it is about to abandon its rights. If, for example, the union abandoned the rights to represent specific employees because they were political opponents of the current executive it is likely that the act of abandonment alone would not be a defence. In this case no such personal discrimination against the complainants was alleged. Moreover, if the union ever did have bargaining rights for casuals, it abandoned them before the complainants became employees at Hydra-Dyne. Thus, it is unnecessary to determine in this case whether such abandonment would have constituted a contravention of section 68 if the complainants had been employed by Hydra-Dyne at that time.

37. Evidence as to exactly when the decision was originally made to agree to the casual/collective agreement split, as the parties call it, is not before me. It had apparently been in place for a period of time measured in years when Mr. Dynes took over from his predecessor in 1984. A person not in the bargaining unit at the time of an alleged breach cannot successfully complain of it since no duty is owed to an employee not in the bargaining unit. See, for example, *C.U.P.E.*, [1974] OLRB Rep. Mar. 176. If the union ever did have bargaining rights for casuals, it had abandoned them by 1985 at the very latest. Thus, even if agreeing to the above state of affairs were a breach of section 68, it occurred long before the complainants were working for Hydra-Dyne. It would not be a breach of which they can complain. The abandonment had become effective to terminate any pre-existing representation rights long prior to the complainants' presence on the scene. This is not a question of delay on the part of Messrs. Skreptak and Stothers. Even if they had filed this complaint in April, 1987, it would have been too late as the bargaining rights had already lapsed. It is therefore unnecessary to deal with the union's argument that their delay in filing the complaint deprives them of any right to a remedy for any breach.

38. In deference to arguments made by both counsel on the effect of past practice, I will address that issue, although the above disposes of the complaint. It is my finding that even if there had been representation rights outstanding on which the complainants could have relied when it first raised the matter with the union in the spring of 1987, the union would not have been in a position to effectively assert them. Because of its previous conduct, it would have been prevented from asserting them at least for the term of that collective agreement (until 1990), by operation of estoppel.

39. Estoppel is a rule of evidence aimed at promoting fairness. The idea is that the union should not be allowed to act as if it did not have the right to represent casual employees, even if it had the legal right to do so, and then turn around and take a contrary position insisting that it did have the right to represent them when it would be unjust to allow it to do so. The Courts, the

Board and arbitrators have all showed a willingness to apply this principle when appropriate, but have required that certain conditions be present - an unambiguous representation, intended to affect legal relationships, which was relied on to its detriment by another party. Estoppel has not been found to exist where the promise or assurance was not clear and unequivocal, *Candesco (1978) Ltd.*, [1982] OLRB Rep. Nov. 1587, or when there was no intention to modify the legal relationship between the parties, as in *Mechanical Contractors Association of Ontario*, [1986] OLRB Rep. June 768. Nor has it or can it be applied to prevent the performance of a duty required by statute. See *Maritime Electric Company v. General Dairies Limited*, [1937] 1 D.L.R. 609, applied in *Culliton Brothers Limited*, [1982] OLRB Rep. Mar. 357, and *K Mart Canada Limited*, [1983] OLRB Rep. May 649, among others. In *Metropolitan Toronto Civic Employees Union and Metropolitan Toronto*, 50 OR (2d) 618, the Divisional Court noted that the application of estoppel was not at odds with the Act's requirement that a collective agreement be in writing.

40. In the Board's view, there is no doubt that the essential elements of an estoppel would have existed in this case even if the bargaining rights had been technically outstanding. As between the employer and the union, a promissory estoppel would have operated to prevent the union from enforcing the collective agreement language set out above in a manner which asserted rights to represent casual employees. This would be consistent with a variety of cases in which the Board and arbitrators have applied an estoppel or its functional equivalent when considering the question of the composition of a bargaining unit. This is a matter of applying estoppel as a matter of evidence pursuant to a statutory duty rather than its application to prevent the performance of such a duty. See, among others, *Ramsay Industries Limited*, [1966] OLRB Rep. June 192, *Lloyd Bank Company Limited*, [1960] OLRB Rep. May 71, *Westburne Industrial Enterprises Ltd.* [1989] OLRB Rep. June 658. A fact situation involving parties other than the parties to a collective agreement is *Silverstein's Bakery Limited*, [1983] OLRB Rep. Dec. 2095. See also, in the arbitral context, *Re Hypernetics Ltd. and I.A.M.A.W., Local Lodge 1542*, 7 L.A.C. (3d) 211 (K. P. Swan). In that case the union was held to be estopped from asserting that students performed jobs falling within a bargaining unit which arguably, by the collective agreement language, covered them, because the union had given the employer an assurance it had no intention of representing students and had failed to take any action in the face of the employer's failure to apply the collective agreement to them.

41. In the same vein, see *General Concrete of Canada*, 9 CLLC ¶14,205. In that case, the Divisional Court considered an arbitration decision which had found "all employee" bargaining unit language in a collective agreement to be unambiguous and therefore to include "independent truckers" whom the Board had earlier found to be employees under the Act. A majority of the Court, Krever, J. dissenting, overturned the decision, finding the language "all employees" to be ambiguous and the arbitrator to have erred in relying on the Board's finding. The Court specifically approved the application of the doctrine of estoppel (presumably if properly made out before a new board of arbitration) to exclude the "independent truckers".

42. Based on all of the above, the Board finds that the union did not continue to be entitled to represent the complainants during their employment with Hydra-Dyne. Therefore it owed them no duty under section 68. The complaint is dismissed.

3067-89-R United Steelworkers of America, Applicant v. Wackenhut of Canada Ltd., Respondent

Certification - Natural Justice - Practice and Procedure - Regular posting at employer's head office inadequate to give notice of all affected employees - Board directing employer to provide Board with employee address list for notice by mail

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *M. Rozenberg* and *K. Davies*.

DECISION OF THE BOARD; March 20, 1990

1. This is an application for certification. In a letter dated March 12, 1990 which accompanied the application, applicant's counsel wrote, in part, as follows:

....

The address and telephone number listed in paragraph 1(c) of the instant application are the address and telephone number of the respondent's head office. The respondent's employees work at a number of sites in the Regional Municipality of Waterloo, Wellington County and Perth County. We are advised that some of the respondents employees attend at the respondents head office every two weeks to pick up their pay cheques, however some employees are paid by direct deposit and do not attend the office on a regular basis. Given these circumstances it is not possible to give notice to all affected employees by posting at the respondents head office and the applicant requests that the Board direct the respondent to post notices at the following sites:

[The letter then lists seventeen sites].

In the alternative the applicant respectfully requests that the Board immediately direct the employer to supply to the Board the addresses of employees in the affected bargaining unit so that service can be effected by mail.

2. In *McLean Security*, [1989] OLRB Rep. Oct. 1048, the Board wrote, in part, as follows:

8. The Board has always recognized that in some employment situations special steps must be taken in order that employees will receive notice of certification proceedings. It does not follow, however, that it is necessary to authorize Labour Relations Officers to travel throughout Ontario posting notices on the premises of the employer's clients. Not only might that raise some difficult legal questions in respect of businesses not themselves covered by the *Labour Relations Act* (embassies or buildings operated by the Federal Crown, for example), but it still would not insure that the guards would receive timely notice. Such approach would require a significant commitment of Board resources without a concomitant assurance that notice would be effected....

9. We do agree, though, that a *potential* problem does exist and that where such problem is identified by either the union or a respondent employer, the Board should modify its general approach as it has done in the case of supply teachers who are called in on an irregular basis and move from school to school. There, too, employees have an irregular work pattern and no fixed place of employment so that postings may not come to their attention. In the case of occasional teachers the Board now routinely requires the employer to prepare and provide to the Board a list of addresses - usually on address labels - so that the Board can send notice, by mail, to the employees in the proposed bargaining unit. Notice by mail is also used in the construction industry where similar problems sometimes arise.

10. We therefore propose to adopt the following practice when dealing with applications regarding security guards. Where neither the trade union or employer raise any notice questions the Board will follow its usual practice, authorized by the Rules, requiring a posting on the employ-

er's premises in such place or places where the notices will come to the attention of the employees affected by a certification application. Where employees regularly visit their employers office to pick up their cheques or receive instructions, that form of notice should be sufficient. However, where either the trade union or the employer identify a potential notice problem, the Board will direct the employer to supply the addresses of employees so that service can be effected by mail. This may entail an extension of the terminal date and some delay in processing the certification application, but, in all likelihood, the delay would be less than that involved in the approach suggested by the union, and the receipt of notice is more certain.

3. Accordingly, the Board hereby directs the respondent to provide the Board on or before March 29, 1990, with a list of addresses (preferably on address labels) of all of the employees in the bargaining unit described in paragraph 3 of the application, to enable the Board to mail notice of this application to the employees affected by it.

4. The terminal date for this application, which would normally be March 30, 1990, is hereby extended to April 11, 1990.

1870-89-R; 1871-89-R Labourers' International Union of North America, Local 506, Applicant v. **Yola Construction Ltd.** and **K & Z Construction Ltd.**, Respondents; International Union of Bricklayers and Allied Craftsmen, Local 2, Applicant v. **Yola Construction Ltd.** and **K & Z Construction Ltd.**, Respondents

Construction Industry - Related Employer - Sale of a Business - Owner of defunct company obtaining ownership interest in existing business - No sale of business - No accompanying expertise or active participation such as to make him "key man" in existing business - Related employer declaration inappropriate - Applications dismissed

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *P. V. Grasso* and *R. W. Pirrie*.

APPEARANCES: *Elizabeth Mitchell*, *Manuel Silva* and *John Robbins* for the applicants; *Walter Thornton* and *J. Bukala* for the respondent **Yola Construction Ltd.**

DECISION OF R. HERMAN, VICE-CHAIR, AND BOARD MEMBER, R. W. PIRRIE; March 19, 1990

1. These two proceedings are applications brought pursuant to the provisions of sections 1(4) and 63 of the *Labour Relations Act*, on behalf of Labourers' Local 506 and Bricklayers Local 2 respectively. **K & Z Construction Ltd.** did not participate in these proceedings.

2. The facts were not substantially in dispute. The respondent **Yola Construction** agrees that **K & Z Construction Ltd.** and **Yola Construction Ltd.** were carrying on associated or related activities, within the meaning of section 1(4) of the Act. The respondent did not dispute that the Board could assume that Mr. Bukala, the key person involved in both companies, had exercised control and direction over the affairs of **K & Z Construction**, within the meaning of section 1(4). It disputes whether he exercised the necessary control or direction over **Yola**, and in any event argues that the Board ought not to exercise its discretion to make a declaration under section 1(4).

3. **Janusz Bukala** arrived in Canada on January 27, 1987. He had no craft or trade skills

nor experience in any aspect of the construction industry. His formal training had been in chemistry. He was unable initially to secure employment. As luck would have it, he went fishing with his brother, who had been living in Canada for some time, and on that fishing trip met Zdzislaw ("Jason") Krawczyk. At that time, Mr. Krawczyk had already registered the name K & Z Construction Ltd., based upon the initials of his name. K & Z was created to work on masonry and bricklaying projects.

4. Mr. Krawczyk was a journeyman bricklayer, and had experience in that part of the construction industry in Ontario. Through discussions between Mr. Krawczyk and Mr. Bukala, Mr. Bukala became a fifty per cent owner in K & Z Construction Ltd., largely because Mr. Bukala's brother invested \$10,000.00 in K & Z. Around March 30, 1987, K & Z was officially incorporated, with Mr. Bukala as Vice-President and Mr. Krawczyk as President. It is Mr. Bukala's involvement in both K & Z and Yola which gives rise to the instant proceedings.

5. K & Z obtained its first job around May, 1987. From that time until some time in the fall of 1987, Mr. Bukala's duties and responsibilities consisted mainly of acting as a general construction labourer on the job sites, pitching in where necessary. As he had no particular skills, there was little else he could do on site. Although Mr. Bukala did sign some contracts on behalf of K & Z, in his capacity as Vice-President, he was not involved in any meaningful sense in the bidding on those contracts. To the contrary, Mr. Krawczyk was responsible for doing the estimating, bidding and tendering, obtaining the contracts, and the hiring and firing of employees. It was Mr. Krawczyk who understood the technical aspects of the business and who had expertise in the bricklaying business. Many of the tenders were submitted by Mr. Krawczyk without consultation with Mr. Bukala.

6. Beginning sometime in the fall of 1987, Mr. Bukala reduced the time he spent on site, and began to work more out of the office, along with his wife. Together, he and his wife were responsible for typing invoices and other documents and forwarding them to the appropriate persons. Where the information to be set out in those documents or invoices was not obvious (for example, payroll amounts, bidding details or amounts), this information was supplied by Mr. Krawczyk. Mr. Bukala and his wife essentially performed clerical tasks in the office. Mr. Bukala was also responsible for collection of debts or obligations owed to the company, and dealing with suppliers.

7. The company did not prosper. Around July, 1987, it was becoming apparent that K & Z did not have enough qualified bricklayers to properly fulfill their contract obligations. In order to remedy this, at Mr. Krawczyk's invitation and request, Bricklayers Local 2 signed up the employees of K & Z. K & Z then signed a collective agreement, both Mr. Krawczyk and Mr. Bukala signing the agreement on behalf of K & Z. Shortly thereafter, a collective agreement was also signed with Labourers' Local 506. Notwithstanding its newly acquired obligations to remit union dues and other moneys to the applicants, K & Z failed to forward the appropriate remittances. Meetings took place during October and December of 1987 between Mr. Bukala and union personnel over the failure to pay the requisite remittances. On December 21, 1987, a grievance was filed with respect to these delinquent payments.

8. Also around this time, K & Z had successfully bid on and received a job for West York Construction Limited. As was customary, Mr. Krawczyk had provided the information for the bid to Mr. Bukala, who in turn had submitted the bid to West York. Towards the end of January, 1988, after K & Z had begun working on the West York project, Mr. Bukala realized that his partner had seriously underquoted on the West York project, and K & Z stood to lose several hundred thousand dollars on the job. This was a loss the company would not likely survive. Meetings were

held with K & Z debtors and creditors, including the unions, to discuss possible responses to this problem. Mr. Kunst, of West York Construction, participated in these meetings and to ensure that the bricklaying and masonry on the project was properly completed, he advised that West York would be willing to assume the financial obligations of K & Z provided certain conditions were met. One of those conditions was that both Mr. Bukala and Mr. Krawczyk cease active participation in the West York project; in effect, that K & Z no longer would be responsible for the work. The conditions were agreed to amongst all concerned, and from the end of January, 1988, K & Z ceased in any practical sense to participate in the West York project. Because of the serious under-bidding on the project by Mr. Krawczyk, and concerns generally with his partner and the prognosis for K & Z, Mr. Bukala decided he should look towards breaking up the K & Z partnership. K & Z did not work on any projects after the end of January, 1988, although it was not formally wound up or otherwise terminated.

9. The applicant unions still had not received the proper remittance funds and took various steps to secure payment. Pursuant to a grievance with K & Z, filed under section 124 of the Act, K & Z and Bricklayers Local 2 reached a settlement on February 15, 1988, in which K & Z agreed to pay \$15,000.00. Only \$5,000.00 of that money was ever paid. On March 8, 1988, pursuant to a grievance with West York dated February 26, 1988, Labourers' Local 506 reached a settlement with West York that included the following:

(1) West York agrees to take full financial responsibility for monies owed by K & Z Construction to its employees and/or to Local 506 for wages, benefits, union dues and other items covered by the Labourers' Provincial Agreement.

(2) Local 506 agrees to pursue K & Z Construction for the money allegedly owed and invoke this agreement only in the event that the union is unable to recover any of the above mentioned monies for violation of said agreement by K & Z.

...

10. Neither applicant has yet been paid the full amount owed by K & Z.

11. After the end of January, 1988, when K & Z stopped operating, Mr. Krawczyk declared personal bankruptcy. He subsequently started up a new company, also performing masonry and bricklaying work. Mr. Bukala has no connection or interaction with this new company. Most of K & Z's equipment was seized by creditors. However, one mixer was bought for cash by Mr. Bukala, and one forklift which Mr. Bukala owned and had rented to K & Z remained with Mr. Bukala. Both the forklift and the mixer are now rented by Mr. Bukala to Yola Construction. One truck was bought by Mr. Krawczyk.

12. We turn now to Yola. While K & Z was rising and failing, Mr. Jessie Materski was involved in his own business in the masonry and bricklaying sector. In January, 1987 (before Mr. Bukala arrived in Canada), Mr. Materski approached two individuals, Andrew Areiszewski and Arthur Kostrzewa, to form a partnership in order to do bricklaying and masonry work. All three had previously worked in the construction sector or had construction experience as bricklayers or welders. The three of them became equal partners, although only Mr. Materski injected any money into the business. They named their company Monika Construction. Monika was incorporated in May or June 1987, with the three partners becoming shareholders.

13. Monika operated until approximately April 1988. Mr. Bukala had no involvement with Monika and for most of this period he was helping to run K & Z, a competitor. There is no suggestion Mr. Bukala even knew that Monika existed. Although Monika was doing relatively well, Mr. Materski and Mr. Areiszewski had become dissatisfied with their third partner, Mr. Kostrzewa.

They felt that he had been taking jobs privately, to the detriment of the company. Mr. Materski and Mr. Areiszewski therefore decided that they would no longer be partners with Mr. Kostrzewa. At the same time, Mr. Areiszewski was also unhappy being part owner and decided he would rather be working as an employee for the business. This left only Mr. Materski as owner, and he felt he could not run the company alone. For approximately two to three weeks in April 1988, Monika stopped operating while Mr. Materski looked for a new partner. One of the major problems Mr. Materski had experienced with Monika, apart from the problems with his former partner, was that none of the three partners spoke English sufficiently well to represent Monika with respect to the outside world. Mr. Materski felt this had been a deficiency in the company and had cost it work opportunities. He was intent that the new partner could represent their company insofar as English speaking skills were concerned. He also wanted any new partner to be trustworthy and honest.

14. Mr. Materski learned from Mr. Areiszewski that Mr. Bukala was in Canada and had been working in the masonry area. Mr. Materski and Mr. Bukala had been friends in Poland for many years, before Mr. Materski came to Canada. K & Z had stopped operating two months earlier and Mr. Bukala was job hunting, outside the construction field. Mr. Materski phoned Mr. Bukala and renewed acquaintances and suggested that they get together to discuss going into a business together. Mr. Materski was not concerned that Mr. Bukala did not know the masonry or bricklaying business and had no particular expertise in it as Mr. Materski possessed the requisite skills and contacts. Mr. Bukala's English was quite good and he was an old friend who would be honest and hardworking. Yola Construction was formed, as a partnership between Materski and Bukala.

15. The financing for the new company was obtained by Mr. Materski investing \$37,000.00, and Mr. Bukala's brother investing approximately \$30,000.00. The money invested by Mr. Bukala's brother was secured against the shares of Yola and the brother received fifteen per cent interest on it. Yola officially began in April, 1988, with the head office listed as Mr. Bukala's residence. Although Yola began as a partnership, in order to secure additional financing and on the advice of its lawyer Yola incorporated almost a year later, around February, 1989, with Mr. Bukala becoming President and owner of 49% of the shares, and Mr. Materski becoming Vice-President and owner of 51% of the shares. Mr. Bukala was made President on the advice of Yola's lawyer, who suggested that the individual who spoke English should be given the title of President.

16. Returning to April and May 1988, when Yola began, most of the initial work force of Yola had worked for Monika. Only one individual who had been an employee for K & Z ended up working for Yola. There is no evidence as to how he came to work for Yola. The key employees of Yola, its crew chiefs, had all previously worked for Materski's first company, Monika, and simply continued working for Yola. Sometime in the latter part of 1988 or the early part of 1989, Yola restructured its workforce. Its crew chiefs formed their own companies, and these companies were hired as independent subcontractors rather than employees by Yola. The former crew chiefs, as heads of each of these subcontracting companies, were responsible for hiring their own crews, supervising them, and paying them. Yola retained responsibility for pricing the contract, bidding on it, hiring the independent subcontractors, and paying on a piece-work basis the appropriate amounts to each subcontractor. Yola throughout this period continued to get customers or jobs as it always had, largely through word of mouth and through builders seeing Yola's work on site and asking Yola to bid on a project. None of the customers of Yola had previously been customers of K & Z. The only equipment Yola used which had been used by K & Z was the forklift Mr. Bukala owned, and the mixer which Mr. Bukala had bought from K & Z, both of which he now rented to Yola.

17. Mr. Materski had the expertise and practical experience in the masonry and bricklaying business and he therefore was responsible for hiring, firing, supervising on site, estimating and bidding upon jobs, reading plans, and in short, any aspect that involved the relevant construction or trade expertise. Though no longer a part owner, Mr. Areiszewski also participated in some of these decisions. Mr. Bukala remained unable to read plans or assist in preparation of the tender, nor could he do bricklaying or masonry. Mr. Bukala received information from Mr. Materski as to what the bid should be along with any conditions that were to be attached to the bid. Mr. Bukala then had the bid typed up and he signed it on behalf of Yola. As the individual with the English speaking skills, Mr. Bukala then met with the builder to discuss matters, where necessary. If the discussion concerned anything of a technical matter, Mr. Bukala would have to ask Mr. Materski for the answer. All the information required for payroll purposes was provided by Mr. Materski, including the hours worked and the amounts of pay for each employee or subcontractor. Mr. Bukala, along with his wife, recorded the payroll information and performed the office clerical functions, including preparing the payroll and writing and signing cheques. Mr. Bukala was responsible for dealing with suppliers and collecting money owed to Yola. Periodically, Mr. Bukala would visit the job sites to deliver or pick up things. Yola engaged the services of the same accountant, a friend of Mr. Bukala's, who had worked for K & Z.

18. Based on these facts, the applicants argue that a transfer of a business within the meaning of section 63 has occurred, or alternatively, that K & Z and Yola ought to be declared a single employer for purposes of the Act pursuant to the provisions of subsection 1(4).

19. The relevant parts of section 63 and subsection 1(4) of the Act read as follows:

63. (1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

1. (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

20. We are satisfied that no sale or transfer of a business has taken place. As the Board stated in *Rivard Mechanical*, [1981] OLRB Rep. May 550:

13. In the construction industry, much of the 'goodwill' associated with a particular business is personal to the key man in the organization. As Mr. Lusk of Costain testified, any contract which his company lets is valid only so long as the original contractor continues to perform the work; the contract is not "his" to transfer or assign. In the present case all of the managerial know-how, expertise and trade reputation which Jean-Guy Rivard brought to the business of J.G. Rivard Limited disappeared when Jean-Guy went out of the business. This does not mean, of course, that other individuals in the organization necessarily start out "from scratch" when they make the decision to go out on their own; often, as here, they can and will rely on exposure and on contacts that they have made while working in a subordinate position in the industry. Even if, as argued by the applicant, the group led by Michel Rivard did not take all of the steps to set up their own business until they had some form of commitment from Costain to provide some work, this is not an uncommon occurrence amongst individuals contemplating such a move, and falls short of the sort of continuity necessary to find a "sale of a business" from J.G. Rivard Limited to the fledgeling group. While the case of *Aircraft Metal Specialists Limited* [1970] OLRB Rep. Sept. 702, involved some change in the nature of the business. There a group of employees, including the individual who was the President and General Manager of the company going out of business, purchased from the predecessor (Field Aviation) certain of its equipment, leased the same premises, and did, on their own, solicit and obtain former customers of Field. The Board stated that there was "not a continuum between Field and Aircraft in the sense contemplated by the Act". Here Jean-Guy did, as one would expect, "put in a good word" with Costain for his brother and former employees, but clearly no arrangement or commitment was arrived at with Costain, and that was in no way a condition of Jean-Guy's decision to discontinue business on his own.

14. The significance of the "key man" to a construction contracting business does not mean that there can never be a "sale of a business" when the original principal sells out (compare *Magnus Engineering*, [1980] OLRB Rep. March 366). It does require, however, a careful analysis of what constituted the "functional economic vehicle" of the predecessor. Certainly the four unwanted trucks leased by Michel fall well short of meeting that definition, and lack that "dynamic quality" necessary to the finding of "a business". The looseness of the arrangements in transferring the trucks over the first couple of weeks, while being painted, is not surprising (given the relationship between the parties) and their use over this period appeared to be confined to the job-site of Costain, who was fully aware of the organizational changes that had occurred. The new group moved to their own location some 15 miles away (not an irrelevant factor in the residential servicing field), essentially purchased their own equipment, and received no work either through or from Jean-Guy Rivard or his company. The new company is financed solely by a line of personal credit arranged by Michel Rivard with his bank, and Jean-Guy Rivard has no part in that arrangement. Nor does there appear to have been any trading on the name or reputation of J.G. Rivard Limited, apart from, as noted before, any contacts made in the ordinary course of employment with that company. The result in this case ought not to turn solely on the fact that Michel is the brother of Jean-Guy, and that the name "Rivard" continues to be used by the new company. The Board accepts the testimony that people in the industry who were familiar with J.G. Rivard Limited would also have been aware, or been made aware, that Jean-Guy Rivard had gone out of business, and that Michel now was in business of his own. The case of *B.R. Rousseau Plumbing*, Board File No. 1463-80-R, released January 19, 1981, (unreported) involved another of the unionized plumbing contractors in the Ottawa area which went out of business at this time, and represents an interesting parallel to the present case. There also it was the brother of the principal of the predecessor company who spun out in business on his own. The application was brought solely on the basis of section 1(4) of the Act, but some of the Board's comments are applicable to section [63] as well. In particular, the Board noted in connection with the use of the family name, at paragraph 10:

...With respect to the fourth criterion, that of representation to the public as a single enterprise, 446073 Ontario Inc. trades as Rousseau Plumbing and Heating. The Board not, however, that this is Gerald Rousseau's family name and a name that he is proud of and wants to continue working with in the Ottawa area. However, there has been no attempt to represent to the public that B.R. Rousseau Plumbing [the

predecessor] and 446073 Ontario Inc. trading as Rousseau Plumbing and Heating are the same company. These two companies operated from different addresses; never shared the same telephone number; operated out of different premises and 446073 Ontario Inc. has adopted colours for its trucks which are quite different from the colours used by B.R. Rousseau Plumbing on its trucks. On this basis the Board finds that there has been no representation to the public that the two respondents are a single enterprise.

15. Both of these cases may be distinguished from that of *Base Electric Limited*, [1978] OLRB Rep. Feb. 140, where the four brothers making up the predecessor company, the Board found, shared the responsibility for the management and goodwill of the company, and, upon separation, divided up amongst themselves all of the remaining assets, work-in-progress, and warranty work of the company. The present case, in fact, is much closer to *Ralph Ford Electric*, [1974] OLRB Rep. June 388. There an individual in a managerial capacity saw his employer being unionized and decided that he would be better off competing on his own on a non-union basis. When he left he took four other employees opposed to the union, the office secretary, and two trucks plus a quantity of electrical components and work shacks purchased from the predecessor company. He then proceeded to obtain by bid the electrical contracts on the house-building project on which the predecessor company, while he was employed, had begun to work. The Board found no sale of a business to have taken place, within the meaning of *The Labour Relations Act*.

21. It cannot be said that any part of the business, or the “functional economic vehicle” of the predecessor, has been transferred in any sense from K & Z to Yola. Mr. Bukala did rent his mixer and fork lift to Yola. Nevertheless, no assets (or anything else) of significance were transferred between the two companies. All that occurred was that Mr. Bukala and his wife began to work for Yola. Neither brought with them any part of the masonry or bricklaying business of K & Z. They brought with them their integrity, industry, typing skills and ability to speak English. The workforces were almost entirely different and the customers were different. We are satisfied that no part of the business was transferred within the meaning of section 63 and the applications as they relate to section 63 are dismissed.

22. Turning to section 1(4), we might usefully set out the following comments from prior decisions of the Board. In *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, the Board wrote as follows:

12. ...Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 which preserves the established bargaining rights and collective agreement when a “business” is transferred from one employer to another. Section 55 has been part of the scheme of the Act since the mid 1960’s. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase “whether or not simultaneously”. The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from

one corporate entity to another, without any of the indicia of a “transfer of a business” which might trigger the application of section 55. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union’s bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section 55 into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. However, it should be noted that section 1(4) is discretionary. The Board need not make a 1(4) declaration even when the conditions precedent are present; and has not done so, for example, where a trade union is seeking to *extend* rather than *preserve* its bargaining rights.

23. In *Jen-Ry Utility Contracting Company Limited* [1984] OLRB Rep. Dec. 1724, the Board wrote:

16. All of these cases make it clear that the test for “control” under section 1(4) of this Act envisions the ultimate power to “call the shots” where necessary, as counsel for the respondent put it, with respect to the labour relations of the two enterprises, and not simply the authority and responsibility to direct the activities of employees in the field. Were it otherwise, a totally independent and established company hiring the manager of field services from another company would inevitably find itself in the position of being a “related employer” for the purposes of the *Labour Relations Act*. Rather, we accept the submission of the respondent that the section contemplates a point of central decision-making control with the ultimate power to, for example, say “yes” or “no” to a wage proposal from the union for both entities. Such power, as the Board cases show, may come simply from the legal relationship between the two entities, (e.g. *Great Atlantic & Pacific Company Limited, A & P Drug Mart Limited*, [1981] OLRB Rep. March 285) or from a total lack of independence in practical or economic terms, (e.g. *J. H. Normick, Foley*, supra, and even *Brant Erecting & Hoisting*, [1980] OLRB Rep. July 945,) or it may come from a combination of the two, (*Kennedy Lodge*, supra, *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214).

And see *Etobicoke Public Library Board* [1989] OLRB Rep. Sept. 935, at paragraphs 86-98, for a discussion of the circumstances in which the Board will not exercise its discretion to make a declaration, even though the statutory conditions precedent are present.

24. It is common ground that two of the three pre-conditions for the exercise of our discretion pursuant to section 1(4) of the Act are met. Two or more entities are involved, K & Z and Yola, and it is conceded that associated or related activities are being carried on by those two entities. Although the respondent acknowledged that Mr. Bukala was involved in the control or direction of K & Z, it disputes that his participation in Yola amounted to control or direction within the meaning of section 1(4). For purposes of our decision, we will assume, without finding, that Mr. Bukala exercises sufficient control or direction with respect to the affairs of Yola such that we can say the two companies were under common control or direction.

25. Mr. Bukala was an owner and officer of K & Z, and when K & Z ceased, he became an

owner and officer of Yola. Through his involvement in each (we have assumed) there was exercised common control or direction. Nevertheless we decline to make the requested direction. In our view, the effect of such a direction would be to extend, rather than preserve, the bargaining rights of the applicants.

26. The applicants obtained bargaining rights for K & Z when K & Z invited them to organize its work force. Mr. Bukala was an owner and officer of that company. However, that company ceased to operate as an active business. No part of the reason for its ceasing was a desire to avoid dealing with the unions. When K & Z was conducting business and when the applicants obtained bargaining rights for K & Z, Monika was itself operating as a completely independent and unconnected company in the same field. It had its own employee workforce and separate customers. Monika was then a company owned and run by Mr. Materski and two other partners. Because Mr. Materski and Mr. Areiszewski wanted to drop the third partner, they looked for a new individual to help continue their business. The business of Monika continued as it always had, essentially on the same basis it always had, albeit with a change in the identity of two of the owners. Mr. Areiszewski stopped being an owner, as he preferred being only an employee, although he continued to assist somewhat in the running of the business. Mr. Kostrzewa was no longer an owner. Mr. Bukala became an owner. The corporate restructuring of Monika was accomplished through the creation of Yola and the business itself continued as it always had. The two to three week interval between the end of Monika, as the corporate entity, and the beginning of Yola, was merely a hiatus in the operation of the same business. The change in ownership and change in name was not accompanied by any meaningful change in the nature or operation of the business.

27. Mr. Bukala had already ceased his involvement with K & Z and that company was no longer functionally operating. This is not a situation where the owner of a unionized company sets up a non-unionized company to engage in the same business; rather, Mr. Bukala became a part owner of and joined the existing business already owned and operated by Mr. Materski. No meaningful part of K & Z's business or expertise joined Yola with Mr. Bukala's 49% ownership interest or other involvement. Mr. Bukala's skills and expertise were not such that it can be reasonably said that he brought with him any part of the K & Z business when he became an owner and officer of Yola. To the contrary, the business of Yola was founded upon the expertise and knowledge of Mr. Materski and his crew chiefs. Mr. Bukala brought with him his personal English skills, his honesty, his integrity, and his willingness to work hard. These are of course valuable, perhaps indispensable, assets, but they are not the attributes, knowledge, or skills that lead us to conclude that Mr. Bukala was a "key man" and brought with him some part of K & Z's business, or to conclude that the applicants' bargaining rights should encompass Yola.

28. Here the only interaction or commonality between companies is the ownership interest of Mr. Bukala, who is an owner in one company (that has ceased to operate) and who obtained an ownership interest in an existing business. This ownership interest in Yola was not accompanied by an expertise in the business nor by active participation that would qualify Mr. Bukala as a "key man". In *Jen-Ry Utility Contracting Company Limited* the Board said (at paragraph 16 therein, *supra*): "Were it otherwise, a totally independent and established company hiring the manager of field services from another company would inevitably find itself in the position of being a "related employer" for purposes of the *Labour Relations Act*." Here, were it otherwise, a totally independent and established company which hired a person (with no special expertise in the company's field) to perform clerical and administrative duties, and which gave the individual a significant minority ownership interest, would find itself a "related employer". If Mr. Bukala was not a part owner of Yola, there would be no question that the application should fail. The applicants emphasized the significance of this ownership interest. We cannot see why his being given a 49% shareholder interest in the circumstances before us should lead to a different result. Mr. Bukala's own-

ership does not change his essential role nor the very limited resources or aspects he brought from K & Z, nor the fact that Yola was already an existing business.

29. To grant a declaration would inappropriately extend the bargaining rights of the applicants to another employer. It would deprive the employees of Monika, most of whom continued working for Yola, from having a say in their representation by a bargaining agent. A declaration would extend the applicants' bargaining rights at the cost of ignoring the wishes of those employees. It is unfortunate that the applicants were unable to collect the funds owed to them by K & Z, but this fact is not justification for making an otherwise inappropriate declaration. As the Board concluded in *Termarg Food Services Limited* [1985] OLRB Rep. March 516, section 1(4) is not to be utilized solely as a means of collecting from a "deep pocket". In this respect, we note the settlement with West York Construction, in which Labourers Local 506 agreed to pursue K & Z for the moneys owed before seeking to recover from West York. It may well be that this proceeding is merely a necessary step before approaching West York.

30. In the result, these applications are dismissed.

DECISION OF BOARD MEMBER PAT V. GRASSO; March 19, 1990

1. This is an application under section 1(4) and 63 of the *Labour Relations Act* whereby the applicants claim that:

...

6. A sale of a business did take place, or alternatively, the Respondents should be treated as constituting one employer for the purposes of the Act in that, at all material times, they were carrying on associated or related activities or businesses under common control or direction within the meaning of section 1(4) of the *Labour Relations Act*.
7. As a result, Yola Construction Ltd. and K & Z Construction Ltd. or the Respondents, as one employer by virtue of section 1(4) of the Act, are bound by the Collective Agreement entered into between the Employer Bargaining Agency and the Labourers' International Union of North America and Labourers' international Union of North America, Ontario Provincial District Council effective May 1st, 1988 until April 30th 1990 ("the Collective Agreement").
8. A change in the character of the business so that it is substantially different from the business of the predecessor employer has *not* taken place.
9. An intermingling of employees of one business with employees of another business represented by a trade union has *not* taken place.
10. The Applicant makes the following request (state nature of relief claimed):
 - (a) If it is found that a sale of a business has taken place, as aforesaid, the Applicant requests that the Board declare Yola Construction Ltd. and K & Z Construction Ltd. bound by the Collective Agreement referred to in paragraph 7 hereof;
 - (b) If it is found that a sale of a business has not taken place, as aforesaid, the Applicant requests that the Board:
 - (i) declare that the respondents be treated as constituting one employer for the purposes of the *Labour Relations Act* in that, at all material times, they were carrying on associated or related businesses or activities under common direction and control within the meaning of Section 1(4) of the Act;

- (ii) declare that the Respondents as a single employer under Section 1(4) of the Act are bound by the Collective Agreement referred to in paragraph 7 hereof;
- (iii) order that the Respondents as a single employer under Section 1(4) of the Act, forthwith apply the full terms and conditions of the Collective Agreement referred to in paragraph 7 hereof to all work performed by the Respondents;

... such further and other relief as may be appropriate in the circumstances.

2. I concur with the decision of the majority with reference to the disposition of the application under section 63 of the *Labour Relations Act*.

3. I dissent from the majority decision with respect to the application under section 1(4) of the *Labour Relations Act*.

4. Just prior to the formation of Yola Construction Mr. Bukala had been part owner of K & Z Construction and Mr. Materski had been part owner of Monika Construction. K & Z stopped operating in January 1988 because it went bankrupt and Monika stopped operating in April 1988 because of problems he was having with his partners. One of the major problems Materski had was that none of the partners spoke English well enough to properly represent Monika to the public and this may have cost them some work opportunities. Materski testified that a new partner would have to be one who spoke English well in order to represent the company in public.

5. It appears to me that when Yola Construction was formed by Mr. Bukala and Mr. Materski each brought with them some expertise. On one hand, Materski brought with him the practice of experience in the masonry business, he had the responsibility for hiring, supervising, bidding on jobs and other relevant work. He was secretary of Yola and owned 51% of the company. On the other hand, Bukala brought with him the skills that Materski was looking for in order to make Yola a successful business. Bukala made sure that all the bids were properly typed and signed by him on behalf of Yola. Mr. Bukala would meet with builders to discuss any problem that may come up, he would prepare the payroll for the employees, was responsible for dealing with suppliers, ordering material, collecting monies owed to the company and preparing and signing cheques. Bukala along with his wife did all the administration work in the office. Bukala was president of Yola and owned 49% of the company. Along with the above duties and responsibilities Mr. Bukala brought with him from K & Z, his wife, a friend "bricklayer" (no name given), the service of the same accountant, a forklift and mixer. The fact that the forklift and mixer were rented to Yola, I attach no significance to it.

6. Based on all the evidence and submission of the parties, I would have exercised our discretion and issue a declaration that K & Z Construction Ltd. and Yola Construction Ltd. were a related employer under common control or direction pursuant to section 1(4) of the *Labour Relations Act*. As a consequence of this decision Yola Construction Ltd. must abide by the terms of the collective agreements.

COURT PROCEEDINGS

0290-83-U (Court File No. 20114) Consolidated-Bathurst Packaging Ltd., Applicant v. International Woodworkers of America, Local 2-69 and The Ontario Labour Relations Board, (Respondents)

Judicial Review - Natural Justice - Practice and Procedure - Supreme Court of Canada finding no breach of natural justice for Board panel hearing case to discuss policy implications of a draft decision at Full Board meeting - Rules of natural justice should not discourage administrative bodies from taking advantage of accumulated experience of their members - Board justified in taking appropriate measures to ensure conflicting results not inadvertently reached in similar cases - Full Board being formalized consultation process which cannot be used to force or induce decision makers to adopt positions with which they do not agree - Procedure not giving rise to reasonable apprehension of bias - Parties having right to respond to any new ground arising at Full Board on which they have not made representations - Appeal dismissed

Board decision found at [1984] OLRB Rep. Mar. 422.

Divisional Court decision found at (1985) 51 O.R. (2d) 481.

Court of Appeal decision found at (1986) 56 O.R. (2d) 513.

Supreme Court of Canada, Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin JJ., March 15, 1990

on appeal from the Court of Appeal for Ontario

APPEAL from a judgment of the Ontario Court of Appeal (1986), 56 O.R. (2d) 513, allowing an appeal from a judgment of the Divisional Court (1985), 51 O.R. (2d) 481, 20 D.L.R. (4th) 84, 85 CLLC 14,031, granting an application to quash a decision of Ontario Labour Relations Board, [1983] OLRB Rep. December 1995, 5 CRBR (NS) 79, made on a reconsideration of its original decision, [1983] OLRB Rep. September 1411, 4 CLRBR (NS) 178. Appeal dismissed, Lamer and Sopinka JJ. dissenting.

William R. Herridge, Q.C., for the appellant.

Paul Cavalluzzo and David Bloom, for the respondent International Woodworkers of America, Local 2-69.

Gordon F. Henderson, Q.C., and R. Ross Wells, for the respondent Ontario Labour Relations Board.

Solicitors for the appellant: Beard, Winter, Toronto.

Solicitors for the respondent International Woodworkers of America, Local 2-69: Cavalluzzo, Hayes & Lennon, Toronto.

Solicitors for the respondent Ontario Labour Relations Board: Gulling & Henderson, Ottawa.

CORAM: *Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and McLachlin JJ.*

Gonthier J. -- I have had the opportunity to read the reasons of my colleague, Sopinka J., and I must respectfully disagree with his conclusions in this case. While I do not generally disagree with the summary of the facts, decisions and issues, I consider it useful to refer to them in somewhat more detail.

The appeal is from a decision of the Court of Appeal of Ontario dismissing an application for judicial review of two decisions of the Ontario Labour Relations Board ("Board"). In the first decision, a tripartite panel composed of G.W. Adams, Q.C., Chairman of the Board, W.H. Wightman and B.F. Lee representing the management and labour sides respectively, decided, Mr. Wightman dissenting, that the appellant had failed to bargain in good faith with the respondent union because it did not disclose during the negotiations its impending decision to close the plant covered by the collective agreement. Counsel for the appellant then learned that a full board meeting had been called to discuss the policy implications of its decision when it was still in the draft stage. The parties were neither notified of nor invited to participate in this meeting. The appellant applied for a reconsideration of this decision under s.106 of the *Labour Relations Act*, R.S.O. c. 228, on the ground that the full-board meeting had vitiated the Board's decision and on the ground that the evidence adduced at the first hearing had been improperly considered. The same panel rejected both these arguments in the second decision (the "reconsideration decision").

The Board's decisions were challenged in the Divisional Court on the basis: 1) that the original decision was manifestly unreasonable in fact and in law, and 2) that the full board meeting called by the Board prior to the panel's decision constituted a violation of the rules of natural justice. The Divisional Court rejected the first ground and the appellant did not raise this argument in the Court of Appeal nor in this Court. Thus, the only issue before this Court is whether the impugned meeting vitiated the first decision rendered by the Board on the ground that the case was there discussed with panel members by persons who did not hear the evidence nor the arguments.

In order to determine whether the principles of natural justice have been breached in this case, it is necessary to examine in some detail the facts which led to the initial complaint made by the respondent union. It will also be necessary to examine the evidence as to the purpose and the context of the full board meeting so as to understand the policy matters in issue at that meeting.

I - The Facts

(a) Plant Closure and Collective Agreement Negotiations

The appellant operated a corrugated container plant in Hamilton (the "Hamilton plant") and decided to close it on April 26, 1983. This decision was approved by the Board of Directors on February 25, 1983 and announced on March 1, 1983. The respondent union was the bargaining agent for the employees of the Hamilton plant and negotiated a new collective agreement with the appellant from November 2, 1982 to January 13, 1983, the date at which a memorandum of settlement was concluded. The collective agreement was signed on April 22, 1983. It is obvious from the evidence heard by the Board that the decision to close the Hamilton plant and the labour negotiations concerning this plant took parallel courses. It is also obvious that the respondent union was never informed of the possibility of an impending plant closure. Although its demands did initially include a modification of art. 18.26 of the existing collective agreement concerning plant closure and severance pay, the respondent union unilaterally dropped this demand during the negotiations and art. 18.26 was simply renewed. At no other point during the negotiations did the subject of plant closure arise.

According to the testimonies of the representatives of the appellant, the Hamilton plant was so unprofitable that it would have been closed in 1982 if an industry-wide strike had not taken place from June to December of that year. The Hamilton plant remained open during that period and the appellant hoped that some goodwill would be generated through the new contracts entered into as a result of the industry-wide strike. As early as 1981, following the negotiation of the 1980-82 collective agreement, the appellant and the respondent union met to discuss concerns over the possibility of a plant closure given the severe losses anticipated for that year. The appellant had

decided to run the plant around and sought the respondent union's collaboration adding that there were no plans to close the Hamilton plant at that time. In October of 1981, the employees of the bargaining unit did commit themselves to the improvement of productivity at the plant. After registering a loss of \$1.3 million for the year 1981, the appellant continued to invest in the Hamilton plant but warned that it would not continue to "throw 'good money after bad'" and that the plant would have to become profitable in the short term. In May of 1982, immediately before the industry-wide strike, 25 employees had to be laid off and the plant was operating only two shifts a day on a four-day work week.

In this context, the industry-wide strike was a godsend for the Hamilton plant. New clients had to award contracts to the Hamilton plant for the duration of this strike and the plant was operating at capacity, three shifts a day seven days a week. Unfortunately, the anticipated goodwill from new customers did not materialize and Mr. Ted. Haiplik, Vice-President and General Manager of the Container Division, reported to his superiors that in his opinion the Hamilton plant should be closed. Mr. Souccar, to whom Mr. Haiplik reports, testified that this recommendation was made to him in the "first or second week of February during one of their regular meetings". The matter was brought to the attention of the Board of Directors during their meeting of February 25, 1983 and they decided that the plant would close on April 26, 1983. Mr. Souccar insisted that it took four to five weeks following the end of the industry-wide strike to determine the amount of market share retained by the appellant and assess its viability under normal circumstances. Thus, according to Mr. Souccar, no decision concerning the closure of the Hamilton plant could be made before February of 1983.

Throughout this period, no mention was made of the possibility of plant closure during the negotiations except to point out that customers were monitoring these negotiations closely to see whether there was any possibility of a strike after the deadline set for January 8, 1983 by the respondent union. Moreover, Mr. Gruber, labour negotiator for the appellant, testified that he was not aware of any plans to close the plant during the negotiations. It is in this context that the Board was asked to determine whether the appellant had breached its obligation to bargain in good faith and, more particularly, whether it had the obligation to disclose its plans to close the Hamilton plant.

The obligation to disclose, without being asked, information relevant to any particular labour negotiation was held by the Board to be part and parcel of the obligation to bargain in good faith in *United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Ltd.*, [1980] OLRB Rep. 577, (*Westinghouse*), where this information relates to plans "which, if implemented during the term of the collective agreement, would have a significant impact on the economic lives of bargaining unit employees" (at p. 598). In order to understand the policy issues which were the subject of discussion at the full board meeting held by the Board, it is necessary to analyse the *Westinghouse* decision and its implications in this case.

(b) *The Westinghouse Decision and the Arguments Raised by the Parties before the Board*

In *Westinghouse*, management had decided to relocate its Switchgear and Control Division from Hamilton to several other locations two months after the conclusion of negotiations for a collective agreement. In this decision, the Board ruled that the obligation to bargain in good faith set out in s.14 of the *Labour Relations Act*, now s.15, comprised the obligation to reveal during the course of negotiations decisions which may seriously affect members of the bargaining unit. However, the Board found it difficult to define the point at which a planned decision becomes sufficiently certain to warrant disclosure during the negotiations without creating unnecessarily threatening perceptions in the bargaining process. The Board described as follows the perils of forced disclosure of

plans which may be discarded in the future and held that an employer does not have the obligation to disclose plans until they have become at least *de facto* decisions, at pp. 598-99:

41. The competitive nature of our economy and the ongoing requirement of competent management to be responsive to the forces at play in the marketplace result in ongoing management consideration of a spectrum of initiatives which may impact on the bargaining unit. More often than not, however, these considerations do not manifest themselves in hard decisions. For one reason or another, plans are often discarded in the conceptual stage or are later abandoned because of changing environmental factors. The company's initiation of an open-ended discussion of such imprecise matters at the bargaining table could have serious industrial relations consequences. The employer would be required to decide in every bargaining situation at what point in his planning process he must make an announcement to the trade union in order to comply with section 14. Because the announcement would be employer initiated and because plans are often not transformed into decision, the possibility of the union viewing the employer's announcement as a threat (with attendant litigation) would be created. If not seen as a threat the possibility of employee overreaction to a company initiated announcement would exist. A company initiated announcement, as distinct from a company response to a union inquiry may carry with it an unjustified perception of certainty. The collective bargaining process thrusts the parties into a delicate and often difficult interface. Given the requirement upon the company to respond honestly at the bargaining table to union inquiries with respect to company plans which may have a significant impact on the bargaining unit, the effect of requiring the employer to initiate discussion on matters which are not yet decided within his organization would be of marginal benefit to the trade union and could serve to distort the bargaining process and create the potential for additional litigation between the parties. *The section 14 duty, therefore, does not require an employer to reveal on his own [sic] initiative plans which have not become at least de facto decisions.*

[Emphasis added.]

The Board then decided that management "had not made a *hard decision* to relocate during the course of bargaining as would have required it to reveal its decision to the trade union" (at p. 599). [Emphasis added.]

The facts in this case are substantially similar to those in the *Westinghouse* case in that a decision which would substantially affect the bargaining unit was taken by management either during or immediately after collective agreement negotiations thereby raising the issue of whether plants to close the Hamilton plant had gone sufficiently far through management's decision-making process to justify their disclosure to union representatives during the course of the negotiations. Before the Board, the appellant and the respondent union both argued, *inter alia*, that the test established in the *Westinghouse* decision ought to be modified. In his reasons, [1983] OLRB Rep. December 1985, Chairman Adams stated the respondent union's position as follows, at p.1428:

26. The complainant's second major alternative argument requested this Board to reconsider its holding in *Westinghouse* that an employer does not have to reveal on his own initiative plans which have not become at least *de facto* decisions. The complainant asserted that the test ought to be disclosure where an employer is "seriously considering an action which if carried out will have a serious impact on employees".

Chairman Adams later summarized the appellant's arguments as follows, at p. 1429:

29. On behalf of the respondent company it was submitted that the extent of its bargaining duty was to disclose any decisions the company had made about the closing of the plant during the course of negotiations. Counsel submitted that on the evidence before the board one could only conclude that a definitive decision had not been made and that the respondent was not obligated to engage in speculation about a possible plant closing during bargaining.

Thus, although other legal and factual arguments were put forward by the parties, the main issue before the Board was whether the *Westinghouse* decision had to be reconsidered and the test it

adopted replaced by either one of the tests proposed by the parties. This issue was a policy issue which had important implications from the point of view of labour law principles as well as of the effectiveness of collective bargaining in Ontario. The Board's desire to discuss it in a full board meeting was therefore understandable.

The Board panel decided in this case, Mr. Wightman dissenting on this issue, that the test set out in the *Westinghouse* case should be confirmed and that in this case, the appellant had made a *de facto* decision to close the Hamilton plant during the course of the negotiations. Thus, the appellant had the obligation to disclose this decision to the respondent union even if no questions were asked on this subject. The Board also found in the alternative that the decision to close the plant was so highly probable that the appellant should have informed the respondent union that if the Hamilton plant's financial situation did not improve in the short term, a recommendation to close the plant would shortly be made to the Board of Directors.

(c) *The Full Board Meeting*

On September 23, 1983, Mr. Michael Gordon, counsel for the appellant, became aware that a full board meeting concerning the Hamilton plant closure was taking place at the Board's offices. Mr. Gordon was aware that full board meetings have been part of the Board's practice for some time but had never been aware that any of the cases in which he had been involved was the subject of such a meeting. The appellant then filed an application for a reconsideration of the initial decision on the basis, *inter alia*, that the practice of holding full board meetings is illegal.

In this reconsideration decision, Chairman Adams described in detail the purpose of these meetings and the way in which they are held. Not surprisingly, Chairman Adams emphasized the necessity to foster coherence and maintain a high level of quality in the decision of the Board, at p. 2001:

6. In considering this question, it is to be noted that the Act confers many areas of broad discretion on the Board in determining how the statute should be interpreted or applied to an infinite variety of factual situations. Within these areas of discretion, decision making has to turn on policy considerations. At this level of "administrative law", law and policy are to a large degree inseparable. In effect, law and policy come to be promulgated through the form of case by case decisions rendered by panels. *It is in this context that the Board is sometimes criticized for not creating enough certainty in "Board law" to facilitate the planning of the parties regulated by the statute.* This criticism, however, ignores the fact that there is a huge corpus of Board law much of which is almost as old as the legislation itself and as settled and stable as law can be. *Board decision-making has recognized the need for uniformity and stability in the application of the statute and the discretions contained therein.* Indeed, it is because there is so much settled law and policy that upwards to 80% of unfair labour practice charges are withdrawn, dismissed, settled or adjusted without the issuance of a decision and that a high percentage of other matters are either settled or withdrawn without the need for a hearing Thus, there is great incentive for the Board to articulate its policies clearly and, once articulated, to maintain and apply them. Nevertheless, there remains, even in applying an established policy, an inevitable area of discretion in applying the statute to each fact situation. *Moreover, the Board reserves the right to change its policies as required and new amendments to the Act create additional requirements for ongoing policy analysis.* To perform its job effectively, the Board needs all the insight it can muster to evaluate the practical consequences of its decisions, for it lacks the capacity to ascertain by research and investigation just what impact its decisions have on labour relations and the economy generally. In this context therefore, and *accepting that no one panel of the Board can bind another panel by any decision rendered*, what institutional procedures has the Board developed to foster greater insightfulness in the exercise of the Board's powers by particular panels? What internal mechanisms has the Board developed to establish a level of thoughtfulness in the creation of policies which will meet the labour relations community's needs and stand the test of time? What internal procedures has the Board developed to ensure the greatest possible understanding of these policies by all Board members in order to facilitate a more or less uniform

application of such policies? *The meeting impugned by the respondent must be seen as only part of the internal administrative arrangements of the Board which have evolved to achieve a maximum regulatory effectiveness in a labour relations setting.*

[Emphasis added.]

It will be noted that Chairman Adams does not claim that the purpose of full board meetings is to achieve absolute uniformity in decisions made by different panels in factually similar situations. Chairman Adams accepts that “no one panel of the Board can bind another panel by any decision rendered” (at p. 2001). The methods used at those meetings to discuss policy issues reflect the need to maintain an atmosphere wherein each attending Board member retains the freedom to make up his mind on any given issue and to preserve the panel members’ ultimate responsibility for the outcome of the final decision. Thus, Chairman Adams states that discussions at full board meetings are limited to policy issues, that the facts of each case must be taken as presented and that no votes are taken nor any attendance recorded, at p. 2002:

8. After deliberating over a draft decision, any panel of the Board contemplating a major policy issue may, through the Chairman, cause a meeting of all Board members and vice-chairmen to be held to acquaint them with this issue and the decision the panel is inclined to make. These “Full Board” meetings have been institutionalized to facilitate a maximum understanding and appreciation throughout the Board of policy developments and to evaluate fully the practical consequences of proposed policy initiatives on labour relations and the economy in the Province. *But this institutional purpose is subject to the clear understanding that it is for the panel hearing the case to make the ultimate decision and that discussion of a “Full Board” meeting is limited to the policy implications of a draft decision.* The draft decision of a panel is place before those attending the meeting by the panel and is explained by the panel members. *The facts set out in the draft are taken as given and do not become the subject of discussion. No vote is taken at these meetings nor is any other procedure employed to identify a consensus.* The meetings invariably conclude with the Chairman thanking the members of the panel for outlining their problem to the entire Board and indicating that all Board members look forward to that panel’s final decision whatever it might be. *No minutes are kept of such meetings nor is actual attendance recorded.* [Emphasis added].

At page 2004 of his reasons, Chairman Adams confirmed that the impugned meeting was held in accordance with the above-mentioned rules.

Finally, Chairman Adams rejected the idea that full board meetings could have an overbearing effect on the panel members’ capacity to decide the issues at hand in accordance with their opinion, at p. 2003:

10. The respondent’s submission is really attempting to probe the mental processes of the panel which rendered the decision in question and in so doing ignores the inherent nature of judicial decision-making and administrative law making ... In general, the deliberations of this panel were not unlike those engaged in by a judge sitting in court. The “Full Board” meeting, to the extent there is no judicial analogy, distinguishes an administrative agency from somewhat more individual common law judging. But, as an extra-record event, “Full Board” meetings are in substance no different than the post-hearing consultation of a judge with his law clerks or the informal discussions that inevitably occur between brother judges. Such meetings, we also suggest, have no greater or lesser effect than a judge’s post-hearing reading of reports and periodicals which may not have been cited or relied on by the advocates.

It follows that the full board meetings held by the Board are designed to promote discussion on important policy issues and to provide an opportunity for members to share their personal experiences in the regulation of labour relations. There is no evidence that the particular meeting impugned in this case was used to impose any given opinion upon the members of the panel or that the spirit of discussion and exchange sought through those meetings was not present during those deliberations. Moreover, three sets of reasons were issued by the members of the panel, one mem-

ber dissenting in part while another dissented on the principal substantive issue at stake in this case. If this meeting had been held for the purpose of imposing policy directives on the members of the panel, it certainly did not meet its objective.

Incidentally, the record does not disclose the identity of all the persons who attended the impugned meeting. In his affidavit, Mr. Gordon, counsel for the appellant before the Board, describes the events which led him to conclude that a full board meeting was taking place; he also lists the persons whom he saw entering or leaving the room where the meeting took place. This affidavit does disclose that Mr. Wightman was seen leaving the room in which the meeting was held but there is no evidence that the other members of the panel did attend the meeting. However, the Board's decision on the motion for reconsideration indicates that all members of the panel attended the meeting.

II - *Decisions of the Courts Below*

Of the two decisions rendered by the Board in this case, only the reconsideration decision is relevant since it alone deals with the issue of the legality of the practice of holding full board meetings on important policy issues. The Board decided that the practice of holding full board meetings on policy issues does not breach principles of natural justice because of its tripartite nature, the manner in which they are conducted and because of the institutional requirements which they serve. According to Chairman Adams, with whom Messrs. Lee and Wightman concurred, ss. 102 and 103 of the *Labour Relations Act* create a procedural framework based on panels composed of three members and the high number of cases handled by the Board creates the necessity to have a large number of full-time and part-time members and, therefore, a wide variety of panels. Such institutional constraints create the necessity to provide a mechanism which would promote a maximum amount of coherence in Board decisions. In essence, the Board decided that full board meetings are a necessary component of decision making within the procedural framework of the *Labour Relations Act* and that they do not breach the principles of natural justice.

In the Divisional Court (1985), 51 O.R. (2d) 481, Rosenberg J., with whom J. Holland J. concurred, allowed the appellant's application for judicial review on the basis that the impugned full board meeting allowed persons who did not hear the evidence to "participate" in the decision even though they did not vote. Rosenberg J. adopted the recommendations of the McRuer Report entitled *Royal Commission Inquiry into Civil Rights*, 1971, vol. 5, Report No. 3, which dealt specifically with the Board and recommended that the parties be notified and given an opportunity to be heard whenever important policy issues must be dealt with by the entire Board, at pp. 2205-06:

In Report Number 1 we pointed out that no person should participate in a decision of a judicial tribunal who was not present at the hearing and heard and considered the evidence and that all persons who had heard and considered the evidence should participate in the decision.

The practice we have outlined violates that principle. To take a matter before the full Board for a discussion and obtain the views of others who have not participated in the hearing and without the parties affected having an opportunity to present their views is a violation of the principle that he who decides must hear.

. . .

Notwithstanding that the ultimate decision is made by those who were present at the hearing, where a division of the Board considers that a matter should be discussed before the Full Board or a larger division, the parties should be notified and given an opportunity to be heard.

The majority stated, at pp. 491-92, that the practice of holding full board meetings creates situations where members who did not hear the evidence can have an influence over the result as well as

situations where arguments are proposed by persons attending the meeting without giving the parties the opportunity to respond:

Chairman Shaw [sic] states in his reasons that the final decision was made by the three members who heard evidence and argument. *He cannot be heard to state that he and his fellow members were not influenced by the discussion at the full board meeting.* The format of the full board meeting made it clear that it was important to have input from other members of the board who had not heard the evidence or argument before the final decision was made. The tabling of the draft decision to all the members of the Board plus all of the support staff involved a substantial risk that opinions would be advanced by others and arguments presented. It is probable that some of the people involved in the meeting would express points of view. The full Board meeting was only called when important questions of policy were being considered. Surely, the discussion would involve policy reasons why s.15 should be given either a broad or narrow interpretation. Members or support staff might relate matters from their own practical experience which might be tantamount to giving evidence. *The parties to the dispute would have no way of knowing what was being said in these discussions and no opportunity to respond.*

[Emphasis added.]

Rosenberg J. then added at p. 492 that factual issues are necessarily built into policy issues since it is impossible, in his opinion, to decide factual issues without a prior determination of the legal standards applicable to them.

Osler J. dissented on the basis that there is no authority prohibiting decision makers acting in a judicial capacity to engage in either formal or informal discussions with their colleagues concerning policy issues at stake in a case standing for judgment. Full board meetings are merely a formalized method of seeking the opinion of colleagues on policy issues. In fact, this practice is desirable given the importance of achieving a high degree of coherence in Board decisions. Osler J. also noted that the tripartite procedural framework imposed by the *Labour Relations Act* made it necessary to resort to full board meetings as a means of achieving such coherence. Finally, Osler J. held that the record in this case does not indicate that either new evidence was heard during the impugned meeting or that new ideas requiring a reply from the parties were discussed during this meeting. The policy alternatives had all been proposed by the parties during argument and Chairman Adams' decision as well as Mr. Wightman's dissent simply adopted one of the alternatives.

The Court of Appeal (1986), 56 O.R. (2d) 513, unanimously allowed the appeal for the reasons set out in Osler J.'s dissent. Cory J.A. (as he then was) added that the following limitations on the practice of holding full board meetings on policy issues must be observed by the Board, at p. 517:

It must be stressed, however, and indeed it was conceded by the appellants, that if new evidence was considered by the entire Board during its discussion, then both parties would have to be recalled, advised of the new evidence and given full opportunity to respond to it in whatever manner they deemed appropriate. In the absence of the introduction of fresh material, the evidence must be taken as found in the draft reasons for the purposes of the full Board discussions.

As in any judicial or *quasi-judicial* proceeding, the panel should not decide the matter upon a ground not raised at the hearing without giving the parties an opportunity for argument. It is also an inflexible rule that while the panel may receive advice there can be no participation by other members of the Board in the final decision.

It was therefore the view of the Court of Appeal that, while some precautions are necessary in the use of any formalized consultation process, the full board meeting procedure described by Chairman Adams does not violate any principle of natural justice.

III - Analysis

(a) *Introduction*

It is useful to begin with a summary of the arguments submitted by the parties. The appellant argues that the practice of holding full board meetings on policy issues constitutes a breach of a rule of natural justice appropriately referred to as “he who decides must hear”. According to the appellant’s version of this rule, a decision maker must not be placed in a situation where he can be “influenced” by persons who have not heard the evidence or the arguments. Thus, the appellant’s position is that panel members must be totally shielded from any discussion which may cause them to change their minds even if this change of opinion is honest, because the possibility of undue pressure by other board members is too ominous to be compatible with principles of natural justice. The appellant also claims that full board meetings do not provide the parties with an adequate opportunity to answer arguments which may be voiced by Board members who have not heard the case.

It is important to note at the outset that the appellant’s arguments raise issues with respect to two important and distinct rules of natural justice. It has often been said that these rules can be separated in two categories, namely “that an adjudicator be disinterested and unbiased (*nemo iudex in causa sua*) and that the parties be given adequate notice and opportunity to be heard (*audi alteram partem*)”: Evans, *de Smith’s Judicial Review of Administrative Action* (4th ed. 1980), at p. 156; see also Peüpin & Ouellette, *Principes de contentieux administratif* (2e éd. 1982), at pp. 148-49. While the appellant does not claim that the panel was biased, it does claim that full board meetings may prevent a panel member from deciding the topic of discussion freely and independently from the opinions voiced at the meeting. Independence is an essential ingredient of the capacity to act fairly and judicially and any procedure or practice which unduly reduces this capacity must surely be contrary to the rules of natural justice.

The respondent union argues that the practice of holding full board meetings on important policy issues is one which is justified for the reasons set forth by Chairman Adams in the reconsideration decision quoted previously.

Before embarking on an analysis of these arguments, one should keep in mind the difference between a full board meeting and a full board hearing: a full board hearing is simply a normal hearing where representations are made by both parties in front of an enlarged panel comprised of all the members of the Board in the manner prescribed by s.102 of the *Labour Relations Act*; on the other hand, a full board meeting does not entail representations by the parties since they are not invited to or even notified of the meeting. The procedure recommended by the McRuer Report is somewhat different in that it entails the presence of the parties of an informal meeting where they would have the right to answer the arguments raised by members of the Board. In this case, the parties have not made any arguments on the relative virtues of these procedures and have restricted their arguments to the legality of the full board meeting procedure in relation to the rules of natural justice.

I agree with the respondent union that the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal such as the Board to abide strictly by the rules applicable to courts of law. In fact, it has long been recognized that the rules of natural justice do not have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces. This principle was reiterated by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:

2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which, as Harman L.J. said, [*Ridge v. Baldwin*, at p.850] is only "fair play in action". *In any particular case, the requirements of natural justice will depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth"*: per Tucker L.J. in *Russell v. Duke of Norfolk*, at p. 118. To abrogate the rule of natural justice, express language of necessary implication must be found in the statutory instrument.

[Emphasis added.]

The main issue is whether, given the importance of the policy issue at stake in this case and the necessity of maintaining a high degree of quality and coherence in Board decisions, the rules of natural justice allow a full board meeting to take place subject to the conditions outlined by the Court of Appeal and, if not, whether a procedure which allows the parties to be present, such as a full board hearing, is the only acceptable alternative. The advantages of the practice of holding full board meetings must be weighed against the disadvantages involved in holding discussions in the absence of the parties.

(b) The Consequences of the Institutional Constraints Faced by the Board

The *Labour Relations Act* has entrusted the Board with the responsibility of fostering harmonious labour relations through collective bargaining, as appears clearly in the preamble of the Act:

WHEREAS it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

The Board has been granted the powers through necessary to achieve this task, not the least of which is the power to decide in a final and conclusive manner all matters which fall within its jurisdiction: s.106(1) of the *Labour Relations Act*. As was stated by Chairman Adams in his reconsideration decision, the Board has also been given very broad discretionary powers as is the case with the power to determine what constitutes "bargaining in good faith" (s.15).

The immensity of the task entrusted to the Board should not be underestimated. As Chairman Adams wrote in the reconsideration decision, the Board had a caseload of 3189 cases to handle in 1982-83 and employed 12 full-time chairman and vice-chairmen, 4 part-time vice-chairmen, 10 full-time Board members representing labour and management as well as another 22 part-time Board members to hear and decide those cases. The Board's full-time chairman and vice-chairmen have an average caseload of 266 cases per year. Moreover, the tripartite nature of the Board makes it necessary to have an equal representation from management and labour unions on each panel as appears clearly from s.102 of the *Labour Relations Act*.

102.-(1) The Ontario Labour Relations Board is continued.

(2) The Board shall be composed of a chairman, one or more vice-chairmen and as many members equal in number representative of employers and employees respectively as the Lieutenant Governor in Council considers proper, all of whom shall be appointed by the Lieutenant Governor in Council.

...

(9) The chairman or a vice-chairman, one member representative of employers and one member representative of employees constitute a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Board.

• • •

(11) The decision of the majority of the members of the Board present and constituting a quorum is the decision of the Board, but, if there is no majority, the decision of the chairman or vice-chairman governs.

The rules of governing the quorum of any panel of the Board are especially suited for panels of three although they do not appear to prevent the formation of a larger panel. However, even if the *Labour Relations Act* allows full board hearings, such a procedure would not necessarily be practical every time an important policy issue is at stake.

Indeed, it is apparent from the size of the Board's caseload and from the number of persons which would sit on such an enlarged panel that holding full board hearings is a highly impractical way of solving important policy issues. Furthermore, the difficulties involved in setting up a panel comprised of an equal number of management and labour representatives and in scheduling such a meeting are also obvious when one takes into consideration the large number of Board members who would have to be present. In fact, one wonders whether it is really possible to call a full board hearing every time an important policy issue arises. The solution proposed in the McRuer Report, i.e., allowing the parties to be present and to answer the arguments made at the meeting, would entail similar difficulties since their presence would necessitate some formal procedure and involve organizational difficulties as well.

The first rationale behind the need to hold full board meetings on important policy issues is the importance of benefiting from the acquired experience of all the members, chairman and vice-chairmen of the Board. Moreover, the tripartite nature of the Board makes it even more imperative to promote exchanges of opinions between management and union representatives. As was pointed out clearly by Dickson J. (as he then was) in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.* [1979] 2 S.C.R. 227, the primary purpose of the creation of administrative bodies such as the Ontario Labour Relations Board is to confer a wide jurisdiction to solve labour disputes on those who are best able, in light of their experience, to provide satisfactory solutions to these disputes, at pp. 235-36:

Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

The rules of natural justice should not discourage administrative bodies from taking advantage of the accumulated experience of its members. On the contrary, the rules of natural justice should in their application reconcile the characteristics and exigencies of decision making by specialized tribunals with the procedural rights of the parties.

The second rationale for the practice of holding full board meetings is the fact that the large number of persons who participate in Board decisions creates the possibility that different panels will decide similar issues in a different manner. It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be "[TRANSLATION] difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps as the most intelligible one": Morissette, *Le contrôle de la compétence d'attribution: thèse*,

antithèse et synthèse (1986), 16 R.D.U.S. 591, at p. 632. Given the large number of decisions rendered in the field of labour law, the Board is justified in taking appropriate measures to ensure that conflicting results are not inadvertently reached in similar cases. The fact that the Board's decisions are protected by a privative clause (s.108) makes it even more imperative to take measures such as full board meetings in order to avoid such conflicting results. At the same time, the decision of one panel cannot bind another panel and the measures taken by the Board to foster coherence in its decision making must not compromise any panel member's capacity to decide in accordance with his conscience and opinions.

A full board meeting is a forum for discussion which, in Cory J.A.'s words (as he then was) is "no more than an amplification of the research of the hearing panel carried out before they delivered their decision". Like many other judicial practices, however, full board meetings entail some imperfections, especially with respect to the opportunity to be heard and the judicial independence of the decision maker, as is correctly pointed out by Professors Blache and Comtois in "La décision institutionnelle" (1986), 16 R.D.U.S. 645, at pp. 707-08:

[TRANSLATION] There are advantages and disadvantages to institutionalizing the decision-making process. The main advantages with which it is credited are increasing the efficiency of the organization as well as the quality and consistency of decisions. It is felt that institutional decisions tend to promote the equal treatment of individuals in similar circumstances, increase the likelihood of better quality decisions and lead to a better allocation of resources. Against this it is feared that institutionalization creates a danger of the introduction, without the parties' knowledge of evidence and ideas obtained extraneously and reduces the decision-maker's personal responsibility for the decision to be made.

The question before this Court is whether the disadvantages involved in this practice are sufficiently important to warrant a holding that it constitutes a breach of the rules of natural justice or whether full board meetings are consistent with these rules provided that certain safeguards be observed.

(c) *The Judicial Independence of Panel Members in the Context of a Full Board Meeting*

The appellant argues that persons who did not hear the evidence or the submissions of the parties should not be in a position to "influence" those who will ultimately participate in the decision, i.e., vote for one side or the other. The appellant cites the following authorities in support of its argument: *Mehr v. Law Society of Upper Canada*, [1955] S.C.R. 344, at p.351; *The King v. Huntingdon Confirming Authority*, [1929] 1 K.B. 698, at pp. 715 and 717; *Re Rosenfeld and College of Physicians and Surgeons* (1969), 11 D.L.R. (3d) 148 (Ont. H.C.), at pp. 161-64; *Regina v. Broker-Dealers' Association of Ontario* (1970), 15 D.L.R. (3d) 385 (Ont. H.C.), at pp. 394-95; *Re Ramm* (1957), 7 D.L.R. (2d) 378 (Ont. C.A.), at pp. 382-83; *Regina v. Committee on Works of Halifax City Council* (1962), 34 D.L.R. (2d) 45 (N.S.S.C.), at pp. 53-55; *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577, at p. 594; *Re Rogers* (1978), 20 Nfld. & P.E.I.R. 484 (P.E.I.S.C.), at p. 499; *Doyle v. Restrictive Trade Practices Commission*, [1985] 1 F.C. 362 (C.A.), at p. 371; *Royal Commission Inquiry into Civil Rights*, vol. 5, Report 3, chapter 124, at pp. 2004-05. In all those decisions with the exception of *Re Rogers*, some of the members of the panel which rendered the impugned decision had not heard all the evidence or all the representations of the parties; their vote was cast even though some of the members of these panels did not have the benefit of assessing the credibility of the witnesses or the validity of the factual and legal arguments. I agree that, as a general rule, the members of a panel who actually participate in the decision must have heard all the evidence as well as all the arguments presented by the parties and in this respect I adopt Pratte J.'s words in *Doyle v. Restrictive Trade Practices Commission*, *supra*, at pp. 368-69:

The important issue is whether the maxim “he who decides must hear” invoked by the applicant should be applied here.

This maxim expresses a well-known rule according to which, where a tribunal is responsible for hearing and deciding a case, only those members of the tribunal who heard the case may take part in the decision. It has sometimes been said that this rule is a corollary of the *audi alteram partem* rule. This is true to the extent a litigant is not truly “heard” unless he is heard by the person who will be deciding his case ... This having been said, it must be realized that the rule “he who decides must hear”, important though it may be, is based on the legislator’s supposed intentions. It therefore does not apply where this is expressly stated to be the case; nor does it apply where a review of all the provisions governing the activities of a tribunal leads to the conclusion that the legislator could not have intended them to apply. Where the rule does apply to a tribunal, finally, it requires that all members of the tribunal who take part in a decision must have heard the evidence and the representations of the parties in the manner in which the law requires that they be heard.

In that case, one of the issues was whether it was sufficient for the members of the panel who had not heard the evidence to read the transcripts and this question was answered in the negative in light of the relevant statutory provisions. In this case, however, the members of the panel who participated in the impugned decision, i.e., Chairman Adams and Messrs. Wightman and Lee, heard all the evidence all the arguments. It follows that the cases cited by the appellant cannot support its argument, nor can the presence of other Board members at the full board meeting amount to “participation” in the final decision even though their contribution to the discussions which took place at the meeting can be seen as a “participation” in the decision-making process in the widest sense of that expression.

However, the appellant claims that the following extract from the reasons of Romer J. in *The King v. Huntingdon Confirming Authority*, *supra*, constitutes the basis of a rule whereby decision makers who have heard all the evidence and representations should not be influenced by persons who have not, at p. 717:

Further, I would merely like to point this out: that at that meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown.

[Emphasis added.]

Thus, Romer J. was of the opinion that the influence of those who did not hear the evidence could go beyond their vote and that this influence constituted a denial of natural justice. Following that reasoning, it was held in *Re Rogers* that the presence of a person who heard neither the evidence nor the representations at one of the meetings where a quorum of the Prince Edward Island Land Use Commission was deliberating invalidated the decision of the Commission even though that person did not vote on the matter. The opposite result was reached in *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board* (1960), 24 D.L.R. (2d) 673 (O.C.A.), where it was held that the presence of Board members who neither heard the evidence nor voted on the matter did not invalidate the Board’s decision, at p. 675.

I am unable to agree with the proposition that any discussion with a person who has not heard the evidence necessarily vitiates the resulting decision because this discussion might “influence” the decision maker. In this respect, I adopt Meredith C.J.C.P.’s words in *Re Toronto and Hamilton Highway Commission and Crabb* (1916), 37 O.L.R. 656(C.A.), at p. 659:

The Board is composed of persons occupying positions analogous to those of judges rather than

of arbitrators merely; and it is not suggested that they heard any evidence behind the back of either party; the most that can be said is that they -- that is, those members of the Board who heard the evidence and made the award -- allowed another member of the Board, who had not heard the evidence, or taken part in the inquiry before, to read the evidence and to express some of his views regarding the case to them.... [B]ut it is only fair to add that if every Judge's judgment were vitiated because he discussed the case with some other Judge a good many judgments existing as valid and unimpeachable ought to fall; and that if such discussions were prohibited many more judgments might fall in an appellate Court because of a defect which must have been detected if the subject had been so discussed.

[Emphasis added.]

The appellant's main argument against the practice of holding full board meetings is that these meetings can be used to fetter the independence of the panel members. Judicial independence is a long standing principle of our constitutional law which is also part of the rules of natural justice even in the absence of constitutional protection. It is useful to define this concept before discussing the effect of full board meeting on panel members. In *Beauregard v. Canada*, [1986] 2 S.C.R. 56, Dickson C.J. described the "accepted core of the principle of judicial independence" as a complete liberty to decide a given case in accordance with one's conscience and opinions without interference from other persons, including judges, at p. 69:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider -- be it government, pressure group, individual or even another judge -- should interfere in fact or attempt to interfere with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

See also *Valente v. The Queen*, [1985] 2 S.C.R. 673, at pp. 686-87, and Benyekhlef, *Les garanties constitutionnelles relatives à l'indépendance du pouvoir judiciaire au Canada*, at p. 48.

It is obvious that no outside interference may be used to compel or pressure a decision maker to participate in discussions on policy issues raised by a case on which he must render a decision. It also goes without saying that a formalized consultation process could not be used to force or induce decision makers to adopt positions with which they do not agree. Nevertheless, discussions with colleagues do not constitute, in and of themselves, infringements on the panel members' capacity to decide the issues at stake independently. A discussion does not prevent a decision maker from adjudicating in accordance with his own conscience and opinions nor does it constitute an obstacle to this freedom. Whatever discussion may take place, the ultimate decision will be that of the decision maker for which he assumes full responsibility.

The essential difference between full board meetings and informal discussions with colleagues is the possibility that moral suasion may be felt by the members of the panel if their opinions are not shared by other Board members, the chairman or vice-chairmen. However, decision makers are entitled to change their minds whether this change of mind is the result of discussions with colleagues or the result of their own reflection on the matter. A decision maker may also be swayed by the opinion of the majority of his colleagues in the interest of adjudicative coherence since this is a relevant criterion to be taken into consideration even when the decision maker is not bound by any *stare decisis* rule.

It follows that the relevant issue in this case is not whether the practice of holding full board meetings can cause panel members to change their minds but whether this practice impinges on the ability of panel members to decide according to their opinions. There is nothing in the *Labour Relations Act* which gives either the chairman, the vice-chairmen or other Board members the

power to impose his opinion on any other Board member. However, this *de jure* situation must not be thwarted by procedures which may effectively compel or induce panel members to decide against their own conscience and opinions.

It is pointed out that "justice should not only be done, but should manifestly and undoubtedly be seen to be done": *Rex v. Sussex Justices*, [1924] 1 K.B. 256, at p. 259. This maxim applies whenever the circumstances create the danger of an injustice, for example when there is a reasonable apprehension by bias, even if the decision maker has completely disregarded these circumstances. However, in my opinion and for the reasons which follow, the danger that full board meetings may fetter the judicial independence of panel members is not sufficiently present to give rise to a reasonable apprehension of bias or lack of independence within the meaning of the test stated by this Court in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.A.C.R. 369, at p. 394, reaffirmed and applied as the criteria for judicial independence in *Valente v. The Queen*, *supra*, at p. 684 (see also p.689):

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, the test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- concluded...."

A full board meeting set up in accordance with the procedure described by Chairman Adams is not imposed: it is called at the request of the hearing panel or any of its members. It is carefully designed to foster discussion without trying to verify whether a consensus has been reached: no minutes are kept, no votes are taken, attendance is voluntary and presence at the full board meeting is not recorded. The decision is left entirely to the hearing panel. It cannot be said that this practice is meant to convey to panel members the message that the opinion of the majority of the Board members present has to be followed. On the other hand, it is true that a consensus can be measured without a vote and that this institutionalization of the consultation process carries with it a potential for greater influence on the panel members. However, the criteria for independence is not absence of influence but rather the freedom to decide according to one's own conscience and opinions. In fact, the record shows that each panel member held to his own opinion since Mr. Wightman dissented and Mr. Lee only concurred in part with Chairman Adams. It is my opinion, in agreement with the Court of Appeal, that the full board meeting was an important element of a legitimate consultation process and not a participation in the decision of persons who had not heard the parties. The Board's practice of holding full board meetings or the full board meeting held on September 23, 1983 would not be perceived by an informed person viewing the matter realistically and practically -- and having thought the matter through -- as having breached his right to a decision reached by an independent tribunal thereby infringing this principle of natural justice.

(d) *Full Board Meetings and the Audi Alteram Partem Rule*

Full board meetings held on an *ex parte* basis do entail some disadvantages from the point of view of the *audi alteram partem* rule because the parties are not aware of what is said at those meetings and do not have an opportunity to reply to new arguments made by the persons present at the meeting. In addition, there is always the danger that the persons present at the meeting may discuss the evidence.

For the purpose of the application of the *audi alteram partem* rule, a distinction must be drawn between discussions on factual matters and discussions on legal or policy issues. In every decision, panel members must determine what the facts are, what legal standards apply to those facts and, finally, they must assess the evidence in accordance with these legal standards. In this case, for example, the Board had to determine which events led to the decision to close the Hamilton plant

and, in turn, decide whether the appellant had failed to bargain in good faith by not informing of an impending plant closing either on the basis that a “*de facto* decision” had been taken or on some other basis. The determination and assessment of facts are delicate tasks which turn on the credibility of the witnesses and an overall evaluation of the relevancy of all the information presented as evidence. As a general rule, these tasks cannot be properly performed by persons who have not heard all the evidence and the rules of natural justice do not allow such persons to vote on the result. Their participation in discussions dealing with such factual issues is less problematic when there is no participation in the final decision. However, I am of the view that generally such discussions constitute a breach of the rules of natural justice because they allow persons other than the parties to make representations on factual issues when they have not heard the evidence.

It is already recognized that no new evidence may be presented to panel members in the absence of the parties: *Kane v. Board of Governors of the University of British Columbia*, *supra*, at pp. 1113-14. The appellant does not claim that new evidence was adduced at the meeting and the record does not disclose any such breach of the *audi alteram partem* rule. The defined practice of the Board at full board meetings is to be discuss policy issues on the basis of the facts as they were determined by the panel. The benefits to be derived from the proper use of this consultation process must be denied because of the mere concern that this established practice might be disregarded, in the absence of any evidence that this has occurred. In this case, the record contains no evidence that factual issues were discussed by the Board at the September 23, 1983 meeting.

In his reasons for judgment, Rosenberg J. has raised the issue of whether discussions on policy issues can be completely divorced from the factual findings, at p. 492:

In this case there was a minority report. Although the chairman states that the facts in the draft decision were taken as given there is no evidence before us to indicate whether the facts referred to those in the majority report of the minority report or both. Also, without in any doubting the sincerity and integrity of the chairman in making such a statement, it is not practical to have all of the facts decided except against a background of determination of the principles of law involved. For example, a finding that Consolidated-Bathurst was seriously considering closing the Hamilton plant is of no significance if the requirement is that the failure to bargain in good faith must be a *de facto* decision to close. Accordingly, until the board decides what the test is the findings of fact cannot be finalized.

With respect, I must disagree with Rosenberg J. if he suggests that it is not practical to discuss policy issues against the factual background provided by the panel.

It is true that the evidence cannot always be assessed in a final manner until the appropriate legal test has been chosen by the panel and until all the members of the panel have evaluated the credibility of each witness. However, it is possible to discuss the policy issues arising from the body of evidence filed before the panel even though this evidence may give rise to a wide variety of factual conclusions. In this case, Mr. Wightman seemed to disagree with Chairman Adams with respect to the credibility of the testimonies of some of the appellant's witnesses. While this might be relevant to Mr. Wightman's conclusions, it was nevertheless possible to outline the policy issues at stake in this case from the summary of the facts prepared by Chairman Adams. In turn, it was possible to outline the various tests which could be adopted by the panel and to discuss their appropriateness from a policy point of view. These discussions can be segregated from the factual decisions which will determine the outcome of the case once a test is adopted by the panel. The purpose of the policy discussions is not to determine which of the parties will eventually win the case but rather to outline the various legal standards which may be adopted by the Board and discuss their relative value.

Policy issues must be approached in a different manner because they have, by definition, an impact

which goes beyond the resolution of the dispute between the parties. While they are adopted in a factual context, they are an expression of principle or standards akin to law. Since these issues involve the consideration of statutes, past decisions and perceived social needs, the impact of a policy decision by the Board is, to a certain extent, independent from the immediate interests of the parties even though it has an effect on the outcome of the complaint.

I have already outlined the reasons which justify discussions between panel members and other members of the Board. It is now necessary to consider the conditions under which full board meetings must be held in order to abide by the *audi alteram partem* rule. In this respect, the only possible breach of this rule arises where a new policy or a new argument is proposed at a full board meeting and a decision is rendered on the basis of this policy or argument without giving the parties an opportunity to respond.

I agree with Cory J.A. (as he then was) that the parties must be informed of any new ground on which they have not made any representations. In such a case, the parties must be given a reasonable opportunity to respond and the calling of a supplementary hearing may be appropriate. The decision to call such a hearing is left to the Board as a master of its own procedure: s.102(13) of the *Labour Relations Act*. However, this is not a case where a new policy undisclosed or unknown to the parties was introduced or applied. The extent of the obligation of an employer engaged in collective bargaining to disclose information regarding the possibility of a plant closing was at the very heart of the debate from the outset and had been the subject of a policy decision previously in the *Westinghouse* case. The parties had every opportunity to deal with the matter at the hearing and indeed presented diverging proposals for modifying the policy. There is no evidence that any new grounds were put forward at the meeting and each of the reasons rendered by Chairman Adams and Messrs. Wightman and Lee simply adopts one of the arguments presented by the parties and summarised at pp. 1427-30 of Chairman Adams' decision. Though the reasons are expressed in great detail, the appellant does not identify any of them as being new or does it contend that it did not have an opportunity to be heard or to deal with them.

Since its earlier development, the essence of the *audi alteram partem* rule has been to give the parties a "fair opportunity of answering the case against [them]": Evans, *de Smith's Judicial Review of Administrative Action* (4th ed. 1980), at p. 158. It is true that on factual matters the parties must be given a "fair opportunity .. for correcting or contradicting any relevant statement prejudicial to their view": *Board of Education v. Rice*, [1911] A.C. 179, at p. 182; see also *Local Government Board v. Arlidge*, [1915] A.C. 120, at pp.133 and 141, and *Kane v. Board of Governors of the University of British Columbia*, *supra*, at p. 1113. However, the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. This right does not encompass the right to repeat arguments every time the panel convenes to discuss the case. For obvious practical reasons, superior courts, in particular courts of appeal, do not have to call back the parties every time an argument is discredited by a member of the panel and it would be anomalous to require more of administrative tribunals through the rules of natural justice. Indeed, a reason for their very existence is the specialised knowledge and expertise which they are expected to apply.

I therefore conclude that the consultation process described by Chairman Adams in his reconsideration decision does not violate the *audi alteram partem* rule provided that factual issues are not discussed at a full board meeting and that the parties are given a reasonable opportunity to respond to any new ground arising from such a meeting. In this case, an important policy issue, namely the validity of the test adopted in the *Westinghouse* case, was at stake and the Board was entitled to call a full board meeting to discuss it. There is no evidence that any other issues were discussed or indeed that any other arguments were raised at that meeting and it follows that the appellant has

failed to prove that it has been the victim of any violation of the *audi alteram partem* rule. Indeed, the decision itself indicates that it rests on considerations known to the parties upon which they had full opportunity to be heard.

IV - Conclusion

The institutionalisation of the consultation process adopted by the Board provides a framework within which the experience of the chairman, vice-chairmen and members of the Board can be shared to improve the overall quality of its decisions. Although respect for the judicial independence of Board members will impede total coherence in decision making, the Board through this consultation process seeks to avoid inadvertent contradictory results and to achieve the highest degree of coherence possible under these circumstances. An institutionalised consultation process will not necessarily lead Board members to reach a consensus but it provides a forum where such a consensus can be reached freely as a result of thoughtful discussion on the issues at hand.

The advantages of an institutionalised consultation process are obvious and I cannot agree with the proposition that this practice necessarily conflicts with the rules of natural justice. The rules of natural justice must have the flexibility required to take into account the institutional pressures faced by modern administrative tribunals as well as the risks inherent in such a practice. In his respect, I adopt the words of Professors Blanche and Comtois in “La décision institutionnelle”, *op. cit.*, at p. 708:

[TRANSLATION] The institutionalising of decisions exists in our laws and appears to be there to stay. The problem is thus not whether institutional decisions should be sanctioned, but to organize the process in such a way as to limit its dangers. There is nothing revolutionary in this approach: it falls naturally into the tradition of English and Canadian jurisprudence that the rules of natural justice should be flexibly interpreted.

The consultation process adopted by the Board formally recognises the disadvantages inherent in full board meetings, namely that the judicial independence of the panel members may be fettered by such a practice and that the parties do not have the opportunity to respond to all the arguments raised at the meeting. The safeguards attached to this consultation process are, in my opinion, sufficient to allay any fear of violations of the rules of natural justice provided as well that the parties be advised of any new evidence or grounds and given an opportunity to respond. The balance so achieved between the rights of the parties and the institutional pressures the Board faces are consistent with the nature and purpose of the rules of natural justice.

For these reasons, I would dismiss the appeal with costs.

Sopinka J.: The issue in this case is the propriety of a practice of the Ontario Labour Relations Board pursuant to which a full Board session is held to discuss a draft decision of a three-person panel.

Facts

The Ontario Labour Relations Board (hereinafter the “Board”) derives its statutory authority under the *Labour Relations Act*, R.S.O. 1980, c. 228 (hereinafter the “Act”). The Board ordinarily sits in panels of three in hearing applications under the Act. This is authorised by s. 102(9) of the Act which provides:

102. ...

(9) The chairman or a vice-chairman, one member representative of employers and one member

representative of employees constitute a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Board.

The original decision of a panel of three members of the Board ([1983] OLRB Rep. September 1411) from which this litigation arises was that the appellant had failed to bargain in good faith by not disclosing during negotiations for a collective agreement that it planned to close its Hamilton plant. In the course of deliberating over this decision, a meeting was held of the full Board to discuss a draft of the reasons. No express statutory authority exists for this practice.

Although we are told that the full Board consists of 48 members, it does not appeal from the record how many attended the meeting in question and whether labour and management were equally represented as contemplated by s. 102(9) of the Act. The affidavit of Mr. Michael Gordon, filed on behalf of the appellant, identifies thirteen of the people present, among them an alternate chairman, several vice-chairmen, a number of Board members, solicitors and senior employees of the Board. Of those specifically identified, only Board member Wightman was a member of the panel which heard the case. Nevertheless it appears from the Board's reasons on reconsideration that the other members of the panel of three were also present.

While it is not contested that no evidence was introduced at this full Board meeting, it is not clear from the record what was discussed. The meeting took several hours but no minutes were kept. The reasons of the Board on reconsideration describe the practice of the Board in relation to full Board hearings but provide no details as to what was discussed. It may be assumed that the matters discussed were in accordance with the Board's practice in this regard. This practice is described in the decision of the Board on Consolidated-Bathurst's application to reconsider the original decision, [1983] OLRB Rep. December 1995, which reads, in part, at paragraph 8:

8. After deliberating over a draft decision, any panel of the Board contemplating a major policy issue may, through the Chairman, cause a meeting of all Board members and vice-chairmen to be held to acquaint them with this issue and the decision the panel is inclined to make. These "Full Board" meetings have been institutionalised to facilitate a maximum understanding and appreciation throughout the Board of policy developments and to evaluate fully the practical consequences of proposed policy initiatives on labour relations and the economy in the Province.

There is no evidence that the procedure at the meeting in question departed from the Board's usual practice, whereby discussion is limited to the policy implications of draft decision, the facts contained in the decision are taken as given, no vote or consensus is taken, no minutes are kept, and no attendance is recorded. The practice is not a recent innovation. It goes back at least as far as 1971 when it was referred to, disapprovingly, in Chief Justice McRuer's report in the *Royal Commission Inquiry into Civil Rights*, February 22, 1971, pp. 2004-6.

The appellant learned of the full Board meeting by chance and requested a reconsideration by the Board of its decision. This request was denied. In the course of its reasons the Board, as mentioned above, described its practice in detail and defended it as promoting consistency in the Board's decisions and as an institutionalisation of the informal practice of conferral among colleagues. The Board considered its practice not a breach of natural justice but rather a procedure well suited to the Board's size, composition, and statutory mandate. Subsequent to the Board's refusal to reconsider its decision, the appellant applied to the Divisional Court for judicial review.

Divisional Court (1985), 51 O.R. (2d) 481 (Ont. Div. Ct.)

The majority of the Divisional Court, with Osler J. dissenting, granted the application, quashed the Board's decision, and ordered the Board to reconsider the matter in light of the Court's rea-

sons for judgment. The reasons for the majority of the Divisional Court, delivered by Rosenberg J., were to the effect that because the parties had no knowledge as to what had been said in the discussions and no opportunity to respond, there was a violation of the principle that he who hears must decide. It could not be said with certainty that the three-member panel was not influenced in its decision by the full Board, because of the lack of evidence as to what transpired at the meeting. Thus the Court quashed the Board's decision. Osler J., on the other hand, was of the view that the common law contained no prohibition of consultation among decision makers and their colleagues, so long as those who have not heard the evidence be given the opportunity to respond to new ideas or evidence, this case provided no evidence that the full Board meeting had yielded any such ideas or evidence.

Court of Appeal (1986), 56 O.R. (2d) 513 (Ont. C.A.)

The decision of the Divisional Court was reversed on appeal to the Court of Appeal. Cory J.A., as he then was, in the Court of Appeal, concluded that pursuant to s. 102(13) of the *Labour Relations Act* the Labour Relations Board had exclusive jurisdiction to determine its own practice and procedure subject only to the obligation to give a full opportunity to the parties to the proceedings to present evidence and make submissions. He further concluded that there was no denial of natural justice in this case and that the meeting was an exercise of common sense whereby the significance and effect of a decision was discussed with other experts in the field. He emphasised, however, that the full Board procedure was limited in that the parties must be recalled if new evidence is considered in the full Board's discussion, and that while the panel can receive advice from the full Board there can be no participation by the other Board members in the decision.

Issues

The issue in this appeal is whether the following rules of natural justice have been violated:

- (a) he who decides must hear;
- (b) the right to know the case to be met.

The Effect of the Full Board Procedure

The first step in deciding whether the rules of natural justice have been breached is to assess what role, if any, the full Board procedure played in the decision-making process. The appellant submits that the outcome of its case may have been influenced by a formalised meeting of the full board. The respondent Union counters by submitting that the appellant must establish a breach of the rules of natural justice but can point to no new evidence or arguments in the decision of the Board that were obtained as a result of the full Board procedure. The purport of the Board's reasons on the application for reconsideration is that the ultimate decision was left to the panel and therefore presumably that the discussion of policy implications did not influence the final decision.

In the Board's reasons on reconsideration, it is stated that the object of the full Board hearings is as follows at p.2002:

These "Full Board" meetings have been institutionalised to facilitate a maximum understanding and appreciation throughout the Board of policy developments and to evaluate fully the practical consequences of proposed policy initiatives on labour relations and the economy in the Province.

The Board further states, at pp. 2002-3, that:

9. "Full Board" meetings are as important to fashioning informed and practical decisions which will withstand the scrutiny of subsequent panels as is the research and reflection undertaken by the vice-chairmen in preparing their draft decisions. ... The "Full Board" meeting merely institutionalises these discussions and better emphasises the broad ranging policy implications of individual decisions.

The learned authors of Sack and Mitchell, *Ontario Labour Relations Board Law and Practice*, at p. 7, summarized the practice in the following terms:

When such a matter is referred in this way, the full Board does not consider the evidence or the facts of the case, but individual members may express their views on questions of law or policy. No vote is taken. The panel which heard the case then confers in private session and reaches a decision. In this way, some uniformity in Board decisions on matters of policy and procedure has been achieved in spite of the fact that differently constituted panels sit every day.

The issue before the Board was whether unsolicited disclosure of a proposed plant closing which was alleged to be at least under serious consideration was an aspect of the duty to bargain in good faith. In this regard the Board was being asked by the respondent Union to extend its decision in *United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Ltd.*, [1980] OLRB Rep. 577, or at least to give it a broad interpretation. That case had decided that, as part of the employer's obligation to negotiate in good faith, an employer had a duty to disclose a *de facto* decision to close a plant. Resolution of this issue required the panel to choose between competing policies. The important role of policy is depicted in the following passages in the Board's original reasons at pp. 1430-31, 1436 and 1443:

In cases of this kind there are, of course, significant conflicting values at stake. There is the desirability of stability in collective bargaining relationships as evidenced by the statutory policy requiring a collective agreement for a minimum term of one year and the twin statutory requirements of "no strike and no lockout". All differences during the term of an agreement are to be funnelled through grievance arbitration. It is also widely understood that management must have the ability to take initiatives in responding to the new demands posed by changing circumstances. The market place seldom awaits labour and management consensus. On the other hand, unilateral management initiatives can adversely affect significant interests of employees and unions who, in the absence of change, may have built up certain expectations and attitudes concerning the status quo.

...

The Board must also be sensitive to the statutory purpose of the bargaining duty, the language describing that duty, and the industrial relations implications of one approach over another.

...

What policy justification then supports greater unsolicited disclosure and merits the Board's intervention in the face of these potential difficulties?

In the result the Board chose to broaden the application of *Westinghouse* by extending the meaning of a *de facto* decision to the facts of this case. At paragraph 53, p.1447 of its decision, it stated:

In any event, we find that the matter of the impending closing was so concrete and highly probable in early January and dealt with by the board of directors in such a perfunctory manner (in that there was no documentation or apparent consideration of alternatives), the company had a minimum obligation to say that unless a certain percentage of the new business was retained or unless there was a dramatic turn in the operation a recommendation to close would be made within the next few weeks. Having regard to the Christmas letter to employees; the productive second half of 1982; and to the then state of dialogue between local labour and management on the future of the plant, the company's silence at the bargaining table was tantamount to a misrepresentation within the meaning of the *de facto* decision doctrine established in *Westinghouse*.

The following passage, at p.2004, from the Board's reasons on reconsideration summarises the participation of the full board in the application of policy:

Unsolicited disclosure in collective bargaining - the issue involved in the case - is an area of great significance to effective and harmonious collective bargaining in this Province and it is fair to say that many of the labour and management Board members in attendance at the meeting gave their reaction to the principles and their application as set out in the draft decision. No vote, however, was held and no other mechanism for measuring consensus was employed.

Given the number of Board members present and the fact that included were an alternate Chairman, Vice-Chairmen and solicitors, the views expressed were potentially very influential.

In view of the above I adopt the following from the reasons of the majority of the Divisional Court as a correct statement as to the effect of the full Board meeting:

Chairman Shaw [sic] states in his reasons that the final decision was made by the three members who heard evidence and argument. He cannot be heard to state that he and his fellow members were not influenced by the discussion at the full board meeting. The format of the full board meeting made it clear that it was important to have input from other members of the board who had not heard the evidence or argument before the final decision was made. The tabling of the draft decision to all of the members of the board plus all of the support staff involved a substantial risk that opinions would be advanced by others and arguments presented. It is probable that some of the people involved in the meeting would express points of view. The full board meeting was only called when important questions of policy were being considered. Surely, the discussion would involve policy reasons why s. 15 should be given either a broad or narrow interpretation. Members or support staff might relate matters from their own practical experience which might be tantamount to giving evidence. The parties to the dispute would have no way of knowing what was being said in these discussions and no opportunity to respond.

I would conclude from the foregoing that the full Board meeting might very well affected the outcome. The Board in its reasons on reconsideration does not directly seek to refute this inference. It does affirm that the final decision was that of the panel. There are two difficulties which confront the Board in seeking to negate the inference. First, I find it difficult to understand how the full Board practice can achieve its purpose of bringing about uniformity without affecting the decision of individual panels. Uniformity can only be achieved if some decisions are brought into line with others by the uniform application of policy. The second difficulty is that in matters affecting the integrity of the decision-making process, it is sufficient if there is an appearance of injustice. The tribunal will not be heard to deny what appears as a plausible objective conclusion. The principle was expressed by Mackay J. in *Re Ramm* (1957), 7 D.L.R. (2d) 378 (Ont. C.A.). Mackay J. wrote, at p.382:

With respect to the difference in the constitution of members of the Public Accountants Council on the first and second hearings, it may very well be that the two members of the Public Accountants Council who were not present at the earlier hearing, abstained from argument on the issues which fell for determination. It appears, however, that they did vote inasmuch as the decision to revoke the licence of the appellant Rumm was unanimous. It is well established that it is not merely of some importance but of fundamental importance, that "justice should not only be done but should manifestly and undoubtedly be seen to be done". In a word, it is not irrelevant to inquire whether two members of the Council who were not present at the earlier meeting took part in the proceeding in the Council's deliberation on the subsequent hearing. *What is objectionable is their presence during the consultation when they were in a position which made it impossible for them to discuss in a judicial way, the evidence that had been given on oath days before and in their absence and on which a finding must be based.* [Emphasis added.]

In *Mehr v. Law Society*, [1955] S.C.R. 344, at p.350, Cartwright J. cited with approval the following passage from the judgment of Lord Eldon L.C. in *Walker v. Frobisher* (1801), 6 Ves. Jun. 70, 31 E.R. 943, at p. 72 and p. 944:

But the arbitrator swears, it [hearing further persons] had no effect upon his award. I believe him. He is a most respectable man. But I cannot from respect for any man do that, which I cannot reconcile to general principles. A Judge must not take upon himself to say, whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice: but upon general principles it cannot be supported.

This statement has been approved previously by this Court in *Szilard v. Szasz*, [1955] 1 D.L.R. 370. Cartwright J. was also impressed by the statement of Romer J. in *Rex v. Huntingdon Confirming Authority*, [1929] 1 K.B. 698, at p. 717:

Further, I would merely like to point out: that at that meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown.

I turn next to consider whether a discussion of policy matters at the full Board meeting which may have affected the outcome constituted a breach of the rules of natural justice.

The Principles of Natural Justice

Section 102(13) of the Act provides that the Board shall give full opportunity to the parties to present their evidence and make their submissions. The Board is empowered to determine its own practice and procedure but rules governing its practice and procedure are subject to the approval of the Lieutenant Governor in Council. While not every practice of the Board would necessarily be subject to the approval of the Lieutenant Governor, the full Board practice is one which might require such approval. No such approval has been given and indeed the practice does not appear to have been adopted formally as a rule of the Board. In view of the fact, however, that this point was not argued I do not propose to deal with it further.

The full Board hearing in this case is said to violate the principles of natural justice in two respects: first, that members of the Board who did not preside at the hearing participated in the decision; and second, that the case is decided at least in part on the basis of materials which were not disclosed at the hearing and in respect of which there was no opportunity to make submissions.

Although these are distinct principles of natural justice, they have evolved out of the same concern: a party to an administrative proceeding entitled to a hearing is entitled to a meaningful hearing in the sense that the party must be given an opportunity to deal with the material that will influence the tribunal in coming to its decision, and deal with it in the presence of those who make the decision. As stated by Crane in his case comment on the *Consolidated Bathurst* decision (1988), 1 C.J.A.L.P. 215, at p.217: "The two rules have the same purpose: to preserve the integrity and fairness of the process." In the first case the party has had no opportunity to persuade some of the members at all, while the second the party has not been afforded an opportunity to persuade the tribunal as to the impact of material obtained outside the hearing.

The concern for justice is aptly put by the pithy statement in the McRuer Report criticising the full Board procedure. At pages 2005-6, the former Chief Justice of the High Court of Ontario states:

To take a matter before the full Board for a discussion and obtain the views of others who have not participated in the hearing and without the parties affected having an opportunity to present their views is a violation of the principle that he who decides must hear.

...

Notwithstanding that the ultimate decision is made by those who were present at the hearing, where a division of the Board considers that a matter should be discussed before the full Board or a larger division, the parties should be notified and given an opportunity to be heard.

Although I am satisfied that, at least formally, the decision here was made by the three-member panel, that does not determine the matter. The question, rather, is whether the introduction of policy consideration in the decision-making process by members of the Board who were not present at the hearing and their application by members who were present but who heard no submissions from the parties in respect thereto, violates the rationale underlying the above principles.

In answering the question, it is necessary to consider the role of policy in the decision-making processes of administrative tribunals. There is no question that the Labour Board is entitled to consider policy in arriving at its decisions. See Dickson J. (as he then was) in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at pp. 235-36.

The labour board is a specialised tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

The Board, then, is obliged by statute to hold a hearing and to give the parties a full opportunity to present evidence and submissions. It is also entitled to apply policy. At a time when the content of the rules of natural justice was determined by classifying tribunals as quasi-judicial or administrative, the Board would have been classified as exercising hybrid functions. A tribunal exercising hybrid functions did so in two stages. As a quasi-judicial tribunal it was required to comply with the rules of natural justice. In making its decision, however, it assumed its administrative phase and could overrule the conclusion which was indicated at the hearing by the application of administrative policy. Examples of this type of tribunal and the jurisprudence relating to its functions can be found in cases such as *B. Johnson & Co. (Builders), Ltd. v. Minister of Health*, [1947] 2 All E.R. 395, and *Re Cloverdale Shopping Centre and the Township of Etobicoke* (1966), 2 O.R. 439 (Ont. C.A.). In this state of law there was no obligation on a tribunal during its administrative phase which was being applied. Although tribunals exercising so-called administrative functions were subject to a general duty of fairness, disclosure of the policy to be applied by the tribunal was generally not a requirement. In the case of hybrid tribunals, therefore, such non-disclosure at the quasi-judicial stage would not have been considered a breach of the rules of natural justice. In this respect policy was treated on the same footing as the law. Both law and policy might be dealt with at the hearing but the tribunal was entitled to supplement it by its own researches without disclosure to the parties.

This view of the role of policy must be re-appraised in light of the evolution of the law relating to the classification of tribunals and the application to them of the rules of natural justice and fairness. The content of these rules is no longer dictated by classification as judicial, quasi-judicial or executive, but by reference to the circumstance of the case, the governing statutory provisions and the nature of the matters to be determined. See *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, and *Syndicat des Employés de Production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 878.

It is no longer appropriate, therefore to conclude that failure to disclose policy to be applied by a tribunal is not a denial of nature justice without examining all the circumstances under which the tribunal operates.

The proceedings which are the subject of this appeal involve the exercise of extraordinary powers by the Board. In this case the Board was asked to order re-opening of the Hamilton plant although it had operated at a loss. Although the Board declined to make that order, it apparently considered that it had jurisdiction to do so. In lieu thereof the employer was ordered to a greater degree than many civil consequences that affect the rights of employers to a greater degree than many civil consequences that affect the rights of employers to a greater degree than many civil actions in the courts in which a litigant enjoys the whole panoply of protection afforded by the rules of practice, procedure and the rules of evidence. The Act, here, provides for a full opportunity to the parties to present evidence and to make submissions. Is this opportunity denied when the tribunal considers and applies policy without giving the parties an opportunity to deal with it at the hearing? Is it a breach of the standard of fairness which underlies the rules of natural justice?

The answers to these questions lie in the nature of policy and whether it is correct to treat it on the same footing as the law. In *Innisfil (Corporation of the Township) v. Corporation of Township of Vespra*, [1981] 2 S.C.R. 145, this Court was called upon to deal with the question whether a party to a proceeding before the Ontario Municipal Board was entitled to challenge policy by leading evidence and by cross-examination - the traditional methods for contesting fact. The Court of Appeal of Ontario had held that government policy introduced at the hearing was not binding but could be met by other evidence. Cross-examination was, however, denied. In this Court, the right to challenge policy by evidence was affirmed. In addition, the appellants were accorded the right to cross-examine and the Court of Appeal was reversed in this respect. Estey J., who delivered the judgment of the Court, stated, at p.167:

On the other hand, where the rights of the citizen are involved and the statute affords him the right to a full hearing, including a hearing of his demonstration of his rights, one would expect to find the clearest statutory curtailment of the citizen's right to meet the case made against him by cross-examination.

If a party has the right to attack policy in the same fashion as fact, it follows that to deprive the party of that right is a denial of a full opportunity to present evidence and is unfair. Policy in this respect is not like the law which cannot be the subject of evidence or cross-examination. Policy often has a factual component which the law does not. Furthermore, under our system of justice it is crucial that the law be correctly applied. The court or tribunal is not bound to rely solely on the law as presented by the parties. Accordingly, a tribunal can rely on its own research and if that differs from what has been presented at the hearing, it is bound to apply the law as found. Ordinarily there is no obligation to disclose to the parties the fruits of the tribunal's research as to the law, although it is a salutary practice to obtain their views in respect of an authority which has come to the tribunal's example of the application of this practice in this Court, see *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, at p. 36. We do not have the same attitude to policy. There is not necessarily one policy that is the right policy. Often there are competing policies, selection of the better policy being dependent on being subjected to the type of scrutiny which was ordered in *Innisfil, supra*.

Ample support can be found in the cases and writings for the proposition that generally policy is to be treated more like fact than law. In *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, Laskin C.J., in holding that the Commission was entitled to rely on policy, stated at p. 171:

... it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by

the *Broadcasting Act*. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.

In de Smith's *Judicial Review of Administrative Action* (4th ed. 1982), at p. 223, the learned author states:

... an opportunity to be heard, both on the application and the merits of the policy, may be required in order to prevent a fettering of discretion.

In support, the learned author cites *R. v. Criminal Injuries Board*, [1973] 1 W.L.R. 1334, at p. 1345, *per* Megaw L.J.:

As to the question of the board's minutes, I think that justice and paragraph 22 of the Scheme alike require that if the board in any particular case are minded to be guided by any principle laid down in any pre-existing minute of the board, the applicant must be informed of the existence and terms of that minute, so that he can, if he wishes, make his submissions with regard thereto: that is, submissions on the questions whether the principle is right or wrong in relation to the terms of the Scheme and whether the principle, if right, is applicable or inapplicable to the facts of the particular case.

Another comment from de Smith is found in the section on the right to a hearing, at p. 182, note 92:

Whilst it would be going too far to assert that in all circumstances there is an implied right to be apprised of and to argue against policy proposals, there are some indications pointing in this direction: se for example, *British Oxygen Co. Ltd. v. Board of Trade*, [1971] A.C. 610, 625, 631 (desirable that notice be given to applicants for industrial grants of any rule or policy generally followed by the Department, and an opportunity for the applicants to make representations on the soundness or applicability of the policy or rule: this would make applications more effective and prevent the Department from fettering its statutory discretion)

In Professor Patrice Garant's *Droit administratif* (2e éd. 1985), he states, at pp. 792-93:

la jurisprudence nous semble bien à l'effet qu'un énoncé de politique ou des directives prises préalablement par un tribunal ne donnent pas lieu à crainte raisonnable de préjugé, si le tribunal respecte la règle *audi alteram partem*, même si la décision à intervenir est conforme à l'énoncé de politique ou aux directives.

See also Dussault and Boargeat, *Traité de droit administratif* (2e éd. 1985), at p. 423, translated by Murray Rankin, Toronto, Carswells, 1985, and Pépin and Ouellette, *Principes de contentieux administratif* (2e éd. 1982), at p. 269.

In the discussion of "The Duty of Disclosure" Aronson and Franklin in *Review of Administrative Action* write, at p. 183:

The extent to which policy, expertise and independent inquiry are integral to the decision-making process will inevitably vary according to the subject matter for decision or investigation. But even in a trial-type hearing, the adjudicator is not bound exclusively by the parties' proofs and arguments, and will need to accommodate public and institutional interests. The more "polycentric", policy-oriented or technical a problem, the greater is the pressure on decision-makers to seek out solutions, to confer separately with interested persons, and to use their experience to find a settlement. The ability of administrators to inform themselves, and to apply their expertise and accumulated experience, and the expectation that they will do so, makes the duty of disclosure sometimes difficult to define, and to observe. *At the same time, however, it enhances the importance of the duty. Disclosure can act as an important safeguard against the use of inaccurate*

material or untested theories. It can also contribute to the efficiency of the hearing by directing argument and information to the relevant issues and materials.

[Emphasis added.]

Wade, *Administrative Law* (4th ed. 1977) states, at p.470:

Policy is of course the basis of administrative discretion in a great many cases, but this is no reason why the discretion should not be exercised fairly *vis-a-vis* any person who will be adversely affected. The decision will require the weighing of any such person's interests against the claims of policy; and this cannot fairly be done without giving that person an opportunity to be heard.

In my opinion, therefore, the full Board hearing deprived the appellant of a full opportunity to present evidence and submissions and constituted a denial of natural justice. While it cannot be determined with certainty from the record that a policy developed at the full Board hearing and not disclosed to the parties was a factor in the decision, it is fatal to the decision of the Board that this is what might very well have happened.

While achieving uniformity in the decisions of individual boards is a laudable purpose, it cannot be done at the expense of the rules of natural justice. If it is the desire of the legislature that this purpose be pursued it is free to authorise the full Board procedure. It is worthy of note that Parliament has given first reading to Bill C-40, a revised *Broadcasting Act* which authorised individual panels to consult with the Commission and officers of the Commission in order to achieve uniformity in the application of policy (s. 19(4)). Provision is made, however, for the timely issue of guidelines and statements with respect to matters within the jurisdiction of the Commission.

Section 114

The respondents do not contend that if a breach of natural justice has occurred, the privative clause in s.108 of the Act would apply. They have, however, submitted that if there was a breach of natural justice, it was technical only and hence no remedy should be available. The respondents cite s.114 of the Act as well as *Toshiba Corp. v. Anti-Dumping Tribunal* (1984), 8 Admin. L.R. 173 (F.C.). Section 114 reads:

114. No proceedings under this Act are invalid by reason of any defect of form or any technical irregularity and no such proceedings shall be quashed or set aside if no substantial wrong or miscarriage of justice has occurred.

Toshiba concerned a preliminary staff report prepared for the Anti-Dumping Tribunal which was not revealed to the parties and which the Court described as "a dangerous practice." Nonetheless, the Court of Appeal was satisfied that the report contained only matters of general knowledge or was based upon facts and sources which were brought out at the hearing in such a manner that the parties had the opportunity to test them. Thus any breach of natural justice was minor and inconsequential and the application for judicial review was dismissed.

The submission that there is no prejudice as a result of a technical breach of rules of natural justice requires that the party making the allegation establish this fact. To do so in this case it would be necessary for the respondents to satisfy the court that the matters discussed were all matters that had been brought out at the hearing. This has not occurred; unlike *Toshiba* there is no report or minutes of the full Board meeting against which the hearing proceedings can be compared. The appellant can hardly be expected to establish prejudice when it was not privy to the discussion before the full Board and there is no evidence as to what in fact was discussed. In the absence of such evidence the gravity of the breach of natural justice cannot be assessed, and I cannot conclude that no substantial wrong has occurred.

Section 102(13)

Nor can I conclude that the full Board procedure is saved by virtue of s.102(13) of the *Labour Relations Act*. Section 102(13) reads:

102. ...

(13) The Board shall determine its own practice and procedure *but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions*, and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable. [Emphasis added.]

I recognise the importance of difference to a Board's choice of procedures expressed by this court in *R v. Quebec Labour Relations Board, ex parte Komo Construction Inc.* (1967), 1 D.L.R. (3d) 125, at P. 127, *per Pigeon J.*:

While upholding the rule that the fundamental principles of justice must be respected, it is important to refrain from imposing a code of procedure upon an entity which the law has sought to make master of its own procedure.

However, in this case the appellant was not given a full opportunity to present evidence and make submissions, which is an explicit limit placed by statute on the Board's control of its procedure. Furthermore, when the rules of natural justice collide with a practice of the Board, the latter must give way.

Disposition

In the result, the appeal is allowed, the judgment of the Court of Appeal is set aside and the other of the Divisional Court restored with costs to the appellant against the respondents both here and in the Court of Appeal.

0120-89-U Graphic Communications and International Union, Local 500M (Applicants) and Council of Printing Industries on behalf of **Empress Graphics Inc.**, and Ontario Labour Relations Board (Respondents)

Judicial Review - Strike - Union members refusing to perform "struck work" - Members of a sister local lawfully locked out by their employer - Collective agreement not requiring employees to handle "struck work" - Whether sympathetic strike contrary to Act - Work refusal properly characterized as a strike - Board issuing direction which may have an educational effect in the printing industry where "struck work" clauses are common - Divisional Court upholding Board decision - Application dismissed

Board decision found at [1989] OLRB Rep. June 587.

Divisional Court, Callaghan C.J.H.G, Reid and Saunders JJ., March 21, 1990:

Callaghan C.J.H.C. (endorsement): Notwithstanding the able argument of Mr. Wray we are not

persuaded that there is any error in the decision of the Board that would justify the intervention of this Court. Costs to the Respondent Council; no costs to the Board.

CASE LISTINGS FEBRUARY 1990

	PAGE
1. Applications for Certification	37
2. Applications for Declaration of Related Employer.....	44
3. Sale of a Business	44
4. Union Successor Rights	45
5. Applications for Declaration Terminating Bargaining Rights.....	45
6. Applications for Declaration of Unlawful Strike	46
7. Applications for Declaration of Unlawful Strike (Construction Industry)	46
8. Applications for Declaration of Unlawful Lockout.....	46
9. Complaints of Unfair Labour Practice	46
10. Applications for Religious Exemption.....	50
11. Applications for Consent to Early Termination of Collective Agreement	50
12. Jurisdictional Disputes.....	50
13. Applications for Determination of Employee Status.....	50
14. Complaints under the Occupational Health and Safety Act	51
15. Construction Industry Grievances	51
16. Applications for Reconsideration of Board's Decision	54

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1990

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0345-89-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Cleanwater Uniform Services Inc. (Respondent)

Unit: "all employees of the respondent in the City of Ottawa, Ontario, save and except supervisors, persons above the rank of supervisor, drivers, office and sales staff" (60 employees in unit)

0835-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Fos-Tur Pipelines Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

1021-89-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Steelfab Mechanical Maintenance Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers' apprentices in the employ of the respondent in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

1422-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Bundy of Canada Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all office employees of the respondent in the City of Cambridge, save and except supervisors, persons above the rank of supervisor, S.P.C. Co-ordinator, Synchronized Co-ordinator, sales staff and secretaries to the Plant Manager and Personnel Manager" (8 employees in unit)

1838-89-R: Retail, Wholesale & Department Store Union (Applicant) v. 749416 Ontario Inc. c.o.b. as Elliot Lake Foodland (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in the Town of Elliot Lake, save and except department managers, persons above the rank of department manager, office and clerical staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (28 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department managers, persons above the

rank of department manager, office and clerical staff" (21 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2057-89-R: Service Employees International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Greenview Lodge Inc. (Respondent)

Unit #1: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, registered, graduate and undergraduate nurses, professional medical staff, paramedical employees, activation director, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (19 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered, graduate and undergraduate nurses, professional medical staff, paramedical employees, office and clerical staff and the activation director" (13 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2176-89-R: Labourers' International Union of North America, Local 527 (Applicant) v. Fidecon Corporation (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2235-89-R: United Employees of Standard Industrial Technologies Inc. (Applicant) v. Standard Industrial Technologies Inc. (Respondent)

Unit: "all employees of the respondent in the City of Cambridge, save and except foremen, persons above the rank of foreman, sales office and clerical staff" (5 employees in unit)

2242-89-R: Labourers' International Union of North America, Local 1059 (Applicant) v. 657417 Ontario Inc. c.o.b. as V.G. Construction (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2327-89-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Geraldton Board of Education (Respondent)

Unit: "all office, clerical and technical employees of the respondent in the District of Thunder Bay, save and except assistant business administrator, persons above the rank of assistant business administrator, native education worker, executive secretary to the director of education, and persons for whom any trade union held bargaining rights as of December 20, 1989" (17 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2351-89-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. K. Schmitt Electric Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by

North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

2380-89-R: United Food & Commercial Workers International Union, Local 326W (Applicant) v. The Guild Inn (Respondent)

Unit: “all front desk clerks and front desk guest service representatives employed by the respondent in the City of Metropolitan Toronto, save and except supervisors, and those above the rank of supervisor, office and sales staff” (6 employees in unit) (*Having regard to the agreement of the parties*)

2393-89-R; 2394-89-R: Service Employees’ Union, Local 268, Affiliated with the S.E.I.U., A.F. of L., C.I.O., & C.L.C. (Applicant) v. Centre for the Developmentally challenged of Thunder Bay & District (Respondent)

Unit #1: “all employees of the respondent in the District of Thunder Bay regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff, paramedical staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in the District of Thunder Bay, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, office and clerical staff, paramedical staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

2398-89-R: International Union United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Zollner Canada Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at Leamington, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (55 employees in unit) (*Having regard to the agreement of the parties*)

2399-89-R; 2450-89-R; 2546-89-R: Hotel, Motel & Restaurant Employees Union, Local 442 (Applicant) v. Maple Leaf Village Investments Inc. (Respondent)

Unit: “all employees of the respondent in the City of Niagara Falls, save and except supervisors, persons above the rank of supervisor, office and sales staff, students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of January 4, 1990” (19 employees in unit) (*Having regard to the agreement of the parties*)

2410-89-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The Frontenac County Board of Education (Respondent)

Unit: “all Continuing Education instructors employed by the respondent in the County of Frontenac, save and except administrator of Continuing Education, persons above the rank of administrator of Continuing Education and grant writer” (19 employees in unit) (*Having regard to the agreement of the parties*)

2411-89-R: United Steelworkers of America (Applicant) v. Customized Transportation Ltd. (Respondent)

Unit: “all employees of the respondent in the City of St. Thomas, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

2427-89-R: Labourers’ International Union of North America, Local 837 (Applicant) v. King Ram Development Corporation Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North

Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

2438-89-R: London & District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Pinehill Cottage (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in St. Thomas, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff” (8 employees in unit)

2439-89-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Kraus Carpet Mills Ltd. (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Waterloo, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office and clerical staff” (11 employees in unit) (*Having regard to the agreement of the parties*)

2446-89-R: Labourers’ International Union of North America, Local 493 (Applicant) v. Matthews Pipeline Inc. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: “all construction labourers in the employ of the respondent in the Town of Kirkland Lake and the geographic Townships adjacent thereto in the District of Temiskaming, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (8 employees in unit)

2462-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Matthews Pipelines Ltd. (Respondent) v. Labourers’ International Union of North America, Local 493 (Intervener)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors of the construction industry in the the Town of Kirkland Lake and the geographic Townships adjacent thereto in the District of Temiskaming, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (11 employees in unit)

2489-89-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Arosan Enterprises Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

2498-89-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Tsai Properties Inc. (Respondent)

Unit: “all employees of the respondent engaged in cleaning and maintenance at 2220 Marine Drive, Oakville, Ontario, including resident superintendents, save and except Property Manager and persons above the rank of Property Manager” (3 employees in unit) (*Having regard to the agreement of the parties*)

2509-89-R: Office & Professional Employee’s International Union (Applicant) v. The Corporation of the Town of Marathon (Respondent)

Unit: “all office and clerical employees of the respondent in the Town of Marathon, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of January 15, 1990” (11 employees in unit) (*Having regard to the agreement of the parties*)

2515-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. DWA Design/Build o/o by D.W.A. Construction Management Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (15 employees in unit)

2523-89-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Servelo Carpentry Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (14 employees in unit)

2528-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Sturgeon Falls Brush Spraying & Cutting Ltd. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all sectors of the construction industry in the the Town of Kirkland Lake and the geographic Townships adjacent thereto in the District of Temiskaming, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2589-89-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Camill Contractors Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2642-89-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Danese Bros. Carpentry (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2651-89-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Ravensbrook Homes Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the County of Simcoe and the District

Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2167-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. D & C Roussy Industries Ltd. (Respondent) v. The Roussy Employees Association (Intervener)

Unit: “all employees of respondent in the City of London, save and except foremen, persons above the rank of foreman, office, sales and technical staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period” (245 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	243
Number of persons who cast ballots	229
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	125
Number of ballots marked in favour of intervener	99

2299-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Norman A. Faucher Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit: “all employees of the respondent in the Town of Amherstburg, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (24 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	20
Number of ballots marked in favour of intervener	0

2375-89-R: Independent Canadian Transit Union (Applicant) v. The Great War Memorial Hospital of Perth District (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: “all Stationary Engineers and persons primarily engaged as their helpers and other categories employed in the maintenance of the Physical Plant, as set out in the wage schedule, employed by the Great War Memorial Hospital of Perth District, Perth, save and except the Maintenance Supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	1

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1679-89-R: Canadian Union of Public Employees (Applicant) v. Carleton Roman Catholic Separate School Board (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Regional Municipality of Ottawa-Carleton employed as teacher assistants, developmental specialists, developmental assistant, save and except supervisors, and persons above the rank of supervisor” (72 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	72
Number of persons who cast ballots	30

Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	29
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	9
Ballots segregated and not counted	1

Applications for Certification Dismissed Without Vote

2079-89-R: IWA-Canada (Applicant) v. Gordon Trailer Sales & Rentals Ltd. (1989) (Respondent) v. Group of Employees (Objectors) (Unit #2) (1 employee in unit)

2366-89-R: Greater Northern Ontario Trucking Association (Applicant) v. Ethier Contractors (Sudbury) Ltd. (Respondent) v. Labourers' International Union of North America, Local 493 (Intervener) (7 employees in unit)

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2079-89-R: IWA-Canada (Applicant) v. Gordon Trailer Sales & Rentals Ltd. (1989) (Respondent)

Unit #1: "all employees of the respondent in the City of Thunder Bay, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	15
Number of persons who cast ballots	15
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	11
Ballots segregated and not counted	1

Unit #2: (see *Applications for Certification Dismissed Without Vote*)

2175-89-R: Aluminum, Brick & Glass Workers International Union (Applicant) v. Keenan Industries Ltd. (Respondent) v. Keenan Woodworkers Union (Intervener)

Unit: "all employees of the respondent in the City of Owen Sound, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (51 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	51
Persons struck off list on consent of parties	2
Persons added to list on request of parties	1
Number of names of persons on revised voter's list	50
Number of persons who cast ballots	40
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	30

2243-89-R: United Paperworkers International Union (Applicant) v. another Tech Corporation (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the District of Kenora, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6

Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	5

Applications for Certification Withdrawn

1533-89-R: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Altoba Development Ltd. (Respondent)

1908-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 853 (Applicant) v. Allaire Electrical & Mechanical Contractors (North Bay) Ltd. (Respondent)

1995-89-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. C.J. Duguid Flooring (Ontario) Ltd. (Respondent)

2038-89-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Airflow Sheet Metal Ltd. (Respondent)

2314-89-R: Ironworkers District Council of Ontario (Applicant) v. Mistyk Welding & Fabricating Ltd. (Respondent) v. The Millwright District Council of Ontario (Intervener)

2437-89-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Francis Contracting Ltd. (Respondent)

2491-89-R: Canadian Union of Public Employees (Applicant) v. The Prescott-Russell County Board of Education (Respondent)

2539-89-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Canshare Cabling Inc. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1833-88-R: McIntosh Limousine Service Ltd. (Applicant) v. Helen Essan; Y.Z.S.I.S. Holdings Inc. (Respondents) v. Teamsters Union, Local No. 938 (Intervener) (*Withdrawn*)

1834-88-R: Aaroprt Limousine Services Ltd. (Applicant) v. Kay Ammolohitis; Abraham Balilty, et al (Respondents) v. Teamsters, Local No. 938 (Intervener) (*Withdrawn*)

1835-88-R: Airlift Limousine Services Ltd. (Applicant) v. David Haik; Victor Nadiv; et al (Respondents) v. Teamsters, Local No. 938 (Intervener) (*Withdrawn*)

1836-88-R: Air Cab Limousine Services (1985) Ltd. (Applicant) v. Ahmed Accoumeh; Jacob Amsterdam, et al (Respondent) v. Teamsters, Local no. 938 (Intervener) (*Withdrawn*)

1888-89-R: Amalgamated Transit Union, Local 1587 (Applicant) v. The Corporation of the Town of Vaughan, and Tokmakjian Ltd. (Respondents) (*Withdrawn*)

2005-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Metro Century Construction Ltd., Chartex Construction Ltd., Mady-Wonsch Construction Ltd., and C. Mady Leaseholds Ltd., and Mady Development Corporation and Mady Executive Group Ltd. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

2005-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Metro Century Construction Ltd., Chartex Construction Ltd., Mady-Wonsch Construction Ltd., and C. Mady Leaseholds Ltd., and Mady Development Corporation and Mady Executive Group Ltd. (Respondents) (*Withdrawn*)

2490-89-R: Canadian Union of Public Employees (Applicant) v. 844381 Ontario Inc., - Kenneth Danile Hammond - Catherine Joy Hammond (o/a Espanola Ambulance Service) (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

2032-89-R: Graphic Communications Union, Local 41-M (Applicant) v. Ottawa Citizen (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2228-88-R: Tish Vassair (Applicant) v. Teamsters Local No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Nedco, Division of Westburne Industrial Enterprises Ltd. (Intervener)

Unit: "all employees of the Nedco, Division of Westburne Industrial Enterprises Ltd., in Mississauga, Ontario, save and except supervisors and foremen, persons above the rank of supervisor and foreman, clerical, office and sales staff, employees who regularly work fewer than 24 hours per week, students and agency workers" (70 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	50
Persons struck off list on consent of parties	3
Number of names of persons on revised voters' list	47
Number of persons who cast ballots	47
Number of ballots marked in favour of respondent	20
Number of ballots marked against respondent	27

1874-89-R: Marilyn D. Woodcock (Applicant) v. United Food & Commercial Workers International Union, Local 633 (Respondent) v. Dollo Bros. Food Market Ltd. (Intervener)

Unit: "all meat department employees of Dollo Bros. Food Market Limited, in the Township of Anson, Hinton and Minden, Ontario, save and except store manager or owner, produce manager, bookkeeper, persons regularly employed for not more than 24 hours per week and students employed in off-school hours and during the school vacation periods and immediate family members of the owners" (4 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

1905-89-R: Ronald Gary Emmons (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:-CLC: (Respondent) v. Hully Gully London Ltd. (Intervener) (10 employees in unit) (*Dismissed*)

1997-89-R: Frances J. Lamothe (Applicant) v. United Steelworkers of America (Respondent) (43 employees in unit) (*Dismissed*)

2347-89-R: Richard A. Alderton (Applicant) v. International Union of Bricklayers & Allied Craftsmen, Local No. 6 Windsor (Respondent) v. D. Barnett & Co. Ltd. (Intervener) (9 employees in unit) (*Granted*)

2409-89-R: Richard Stevermol (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Respondent) v. Sears Canada Inc. (Intervener) (33 employees in unit) (*Dismissed*)

2414-89-R: Stephen Sura (Canada) Ltd. (Applicant) v. Labourers' International Union of North America (Respondent) (1 employee in unit) (*Dismissed*)

2536-89-R: Vernon Alexander Cunningham (Applicant) v. Operative Plasterers & Cement Masons' Interna-

tional Association of the United States & Canada, Restoration Steeplejacks, Local 172 (Respondent) (*Withdrawn*)

2008-89-R: Feliciano Valverde (Applicant) v. Great Lakes Fishermen & Allied Workers Union (Respondent)

Unit: "all employees of Family Fishery Company engaged in commercial fishing on Lake Erie, save and except boat captain and persons above the rank of boat captain" (6 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	6

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2735-89-U: Canada Building Materials Company, A Division of St. Mary's Cement (Applicant) v. Teamsters, Local Union 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America and the individual respondents named on Schedule 'A' attached hereto (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

2689-89-U: Peter Kiewit Sons Co. Ltd. (Applicant) v. International Union of Operating Engineers, Local 793, Doug Bannerman & Harlen Parker (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

2018-88-U: United Steelworkers of America (Applicant) v. Plaza Fibreglas Manufacturing Ltd. & Plaza Electro-Plating Ltd., Citcor Manufacturing Ltd., and Sabina Citron (Respondents) (*Dismissed*)

2532-89-U: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. DFD Steel Industries Ltd. (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3036-87-U: John Borshell (Complainant) v. London & District Workers' Union, Local 220, S.E.I.U., A.F.L. - C.L.C. (Respondent) v. The Sisters of St. Joseph of the Diocese of London in Ontario (Intervener) (*Dismissed*)

3467-87-U: Service Employees' Union, Local 210 (Complainant) v. Windsor Western Hospital Centre (I.O.D.E. Unit) and Dr. J.C. MacDonald & Mr. Zahi Abushar (Respondents) (*Withdrawn*)

2019-88-U: United Steelworkers of America (Complainant) v. Plaza Fibreglas Manufacturing Ltd. and Plaza Electro-Plating Ltd., Citcor Manufacturing Ltd., and Sabina Citron (Respondents) (*Granted*)

3016-88-U: Abel Van Wyk (Complainant) v. Metropolitan Toronto Civic Employees Union, Local 43 Canadian Union of Public Employees and the Municipality of Metropolitan Toronto (Respondents) (*Dismissed*)

3076-88-U: Angela Sansone (Complainant) v. John Graham, Tom Hoar, and Canadian Auto Workers Union (Respondents) (*Withdrawn*)

3077-88-U: Angela Sansone (Complainant) v. General Motors, John Graham, George Knott and Canadian Auto Workers Union and the International Canadian Auto Workers Union (Respondents) (*Withdrawn*)

3122-88-U: United Steelworkers of America (Complainant) v. Plaza Fiberglas Manufacturing Ltd. and Plaza Electro-Plating Ltd. and Sabina Citron (Respondents) (*Granted*)

0036-89-U: Robert T. Eastman (Complainant) v. Keeprite Inc. and Keeprite Workers Independent Union (Respondents) (*Withdrawn*)

0142-88-U; 2800-87-U: Robert McIntyre (Complainant) v. United Steelworkers of America, Local 14045 (Respondent) v. Zalev Brothers Ltd. (Intervener) (*Dismissed*)

0316-89-U: Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 141 (Complainant) v. Co-Fo Concrete Forming Construction Ltd. (Respondent) (*Withdrawn*)

0953-89-U: Labourers' International Union of North America, Local 607 (Complainant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Withdrawn*)

1023-89-U: United Steelworkers of America (Complainant) v. Screen Print Display Advertising Ltd. (Respondent) (*Withdrawn*)

1053-89-U: Brewery, Malt & Soft Drink Workers, Local 304 (Complainant) v. Molson Ontario Breweries Ltd. (Respondent) (*Withdrawn*)

1153-89-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Steinberg Inc., Alain Bilodeau and Richard Bush (Respondents) (*Withdrawn*)

1204-89-U: Graphic Communications International Union, Local 41-M (Complainant) v. British American Bank Note Inc. (Respondent) (*Withdrawn*)

1350-89-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Beatrice Foods Inc. (Respondent) (*Withdrawn*)

1585-89-U: Patrick Coles, Mel Joseph, Bob Williams, Keith Bolton, Carl Duggan, Ed Bradshaw, Brian Donahue, Hugh Richardson, Claude Jones, Gord Hearn (Complainants) v. Bob Ryan, Plant Chairman, Local 303, CAW-Canada, and John Legge, Committee Person, Local 303, CAW-Canada (Respondents) (*Withdrawn*)

1653-89-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Hydon Holdings Ltd. c.o.b. as Hy's Steak House (Respondent) (*Dismissed*)

1696-89-U: United Food & Commercial Workers International Union, Local 1000A (Complainant) v. Hillview Farms Ltd. (Respondent) (*Withdrawn*)

1709-89-U: Labourers' International Union of North America, Local 183 (Complainant) v. York Condominium Corporation No. 202 (Respondent) (*Withdrawn*)

1737-89-U: Janet Eta (Complainant) v. Canadian Union of Public Employees, Local 1996 (Respondent) (*Withdrawn*)

1765-89-U: Labourers' International Union of North America, Local 183 (Complainant) v. Falconwin Property Management (Respondent) (*Withdrawn*)

1768-89-U: Ontario Public Service Employees Union (Complainant) v. Haliburton County Ambulance Service (Respondent) (*Withdrawn*)

1849-89-U: United Food & Commercial Workers International Union (Complainant) v. Boshnick Investments Ltd. o/a Ridley Square IGA (Respondent) (*Withdrawn*)

1893-89-U: United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC: (Complainant) v. National Systems of Baking Ltd. (Respondent) (*Withdrawn*)

1927-89-U: Canadian Union of Public Employees (Complainant) v. George St. L. McCall Chronic Care Wing of the Queensway General Hospital managed by Extendicare Health Services Inc. (Respondent) (*Withdrawn*)

1932-89-U: Teamsters Local No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. James Dick Construction Ltd. (Respondent) (*Withdrawn*)

1951-89-U: Tim Wistow (Complainant) v. CAW, Local 27, (Unit 17) (Respondent) (*Withdrawn*)

1978-89-U: Roy Graham (Complainant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (*Withdrawn*)

1996-89-U: Canadian Union of Restaurant & Related Employees, Hotel Employees & Restaurant Employees Union, Local 88 (AFL-CIO,CLC) (Complainant) v. J. I. Vent Investments Inc. c.o.b. Steak N'Burger (Respondent) (*Withdrawn*)

2026-89-U: Elizabeth Cooper (Complainant) v. Wendy Dupuis, President & Steward Union, Local 217 CUPE (Respondent) (*Withdrawn*)

2091-89-U: Diane R. Floyd (Complainant) v. Hotel, Clubs, Restaurant, Taverns Employees' Union (Respondent) (*Withdrawn*)

2092-89-U: John Brodhagen (Complainant) v. Teamsters, Local Union 938 (Respondent) v. C.T. Transport, Division of McKinlay Transport Ltd. (Intervener) (*Dismissed*)

2125-89-U: Council of Printing Industries of Canada (Complainant) v. Graphic Communications International Union, Locals 500-M, 555-M, 517-M, and 588-M and L. R. Paquette, M. R. Zajac, et al (Respondents) (*Withdrawn*)

2168-89-U: David Foster (Complainant) v. The Brick Warehouse Corp. (Respondent) (*Dismissed*)

2177-89-U: The Windsor Newspaper Guild (Complainant) v. The Windsor Star, a division of Southam Corporation (Respondent) (*Withdrawn*)

2208-89-U; 2209-89-U: Christian Labour Association of Canada (Complainant) v. Avalon Care Centre & Retirement Lodge (Respondent) (*Withdrawn*)

2253-89-U: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters & Joiners of America (Complainant) v. Geiger International (Respondent) (*Withdrawn*)

2257-89-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. U-Need-A-Cab Ltd.; 445731 Ontario Ltd. (Joyco) (Respondents) (*Withdrawn*)

2260-89-U: Ontario Nurses' Association (Complainant) v. Regional Municipality of Peel (Respondent) (*Withdrawn*)

2276-89-U: William John Button (Complainant) v. Amalgamated Clothing & Textile Workers Union (Respondent) v. Courtaulds Films Canada (Intervener) (*Withdrawn*)

2282-89-U: Service Employees' International Union, Local 204 (Complainant) v. 476089 Ontario Ltd., Greenview Lodge (Respondent) (*Withdrawn*)

2285-89-U: Energy & Chemical Workers Union (Complainant) v. The United Way of Sarnia Lambton (Respondent) (*Withdrawn*)

2291-89-U: Ernest Pardy (Complainant) v. Sandy Bradshaw & Don Johnston (Respondents) (*Withdrawn*)

2292-89-U: Ernest Pardy (Complainant) v. Don Johnston, Frank Sharky, Ron Danniels, Sandy Bradshaw (Respondents) (*Withdrawn*)

2293-89-U: Ernest Pardy (Complainant) v. Ron Danniels, Frank Sharky, Don Johnston (Respondents) (*Withdrawn*)

2294-89-U: Greg Valley (Complainant) v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 91 (Respondent) (*Withdrawn*)

2300-89-U: United Steelworkers of America (Complainant) v. Maxville Manor (Respondent) (*Granted*)

2303-89-U: Canadian Union of Public Employees and its Local 3251 (Complainant) v. The Corporation of the City of Cornwall (Respondent) (*Withdrawn*)

2313-89-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Boshnick Investments Ltd. o/a Ridley Square IGA (Respondent) (*Withdrawn*)

2319-89-U: IWA-Canada (Complainant) v. Atway Transport Inc. (Respondent) (*Withdrawn*)

2348-89-U: The Windsor Star, A Division of Southam Inc. (Complainant) v. Windsor Newspaper Guild, Local 239 (Respondent) (*Withdrawn*)

2358-89-U: Teamsters, Local Union 938 (Complainant) v. Trans-Provincial Freight Carriers Ltd. (Respondent) (*Withdrawn*)

2359-89-U: Teamsters Local No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Apache Concrete Co. (Respondent) (*Withdrawn*)

2360-89-U: Diane Floyd (Complainant) v. Hotel, Club, Restaurants & Tavern Employees Union, Local 261 (Respondent) (*Withdrawn*)

2369-89-U: Douglas Dorling (Complainant) v. Ontario Public Service Employees Union (James Clancy) and Ontario Public Service Employees Union (Ms. Sherry Currie) (Respondents) (*Withdrawn*)

2376-89-U: International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Complainant) v. Mistyk Welding & Fabricating Ltd. (Respondent) (*Withdrawn*)

2395-89-U: Pasquale Smarrelli (Complainant) v. International Association of Machinists & Aerospace Workers (Lodge No. 235) (Respondent) (*Withdrawn*)

2406-89-U: Christian Labour Association of Canada (Complainant) v. Benevolent Society 'Heidehof' Home for the Aged (Respondent) (*Withdrawn*)

2461-89-U: Angela Viani (Complainant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) (*Withdrawn*)

2500-89-U: United Brotherhood of Carpenters & Joiners of America, Local 93 (Complainant) v. Concrete Column Clamps (C.C.C.) Ltd., Gaetan Ethier & Claude Gauthier (Respondents) (*Withdrawn*)

2504-89-U: Larry Carroll; Miln Kreiger (Complainants) v. Schneiders Employee Association (Respondent) (*Withdrawn*)

2514-89-U: Mable McLeod (Complainant) v. Canadian Pacific Hotel Corp., a unit of Canadian Pacific Ltd., Hotel Employees Restaurant Employees Union, Local 75 (Respondents) (*Withdrawn*)

2517-89-U: Gerald Edward Malleck (Complainant) v. United Rubber Workers, Local 862 (Respondent) (*Withdrawn*)

2520-89-U: Slavko Rendeovski (Complainant) v. American Standard (Respondent) (*Withdrawn*)

2531-89-U: Vernon Alexander Cunningham, et al (Complainants) v. Operative Plasterers & Cement Masons' International Association of the United States & Canada, Restoration Steeplejacks, Local 172 (Respondent) (*Withdrawn*)

2533-89-U; 2648-89-U: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Complainant) v. DFD Steel Industries Ltd. (Respondent) (*Withdrawn*)

2579-89-U: United Steelworkers of America (Complainant) v. 736044 Ontario Inc., c.o.b. as A & A Metal Cleaning & Stripping (Respondent) (*Withdrawn*)

2619-89-U: Curtis Steeves (Complainant) v. Lear Sieglear (Respondent) (*Withdrawn*)

2654-89-U: Richard Binczak (Complainant) v. Canada Post Corporation (Respondent) (*Dismissed*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

2078-89-M: Glenn A. Gilmore (Applicant) v. CWA TCA (Respondent Trade Union) v. John Deere Welland Works (Respondent Employer) (*Dismissed*)

2385-89-M: Dorothy F. Burke (Applicant) v. London District Service Employees Union, Local 220 and Kitchener Waterloo Hospital (Respondents) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1386-89-M: Gibson's Cleaners Co. Ltd. (Employer) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

2126-89-M: Glove Reconditioners, a Division of Canadian Linen Supply Co. Ltd. of Stoney Creek, Ontario (Employer) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

2418-89-M; 2419-89-M: Christian Labour Association of Canada (Trade Union) v. Peninsula Ready Mix & Supplies Ltd. (Employer) (*Granted*)

2534-89-M: Stelco Fastener & Forging Company, Stelco Inc. (Employer) v. United Steelworkers of America, Locals 3767 & 3749 (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

1078-88-JD: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Complainant) v. Newmarch Inc. and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Respondents) v. Millwright District Council of Ontario, on its own behalf and on behalf of Local 2309 (Intervener) (*Granted*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0907-89-M: London & District Service Workers' Union, Local 220 (Applicant) v. Meadow Park Nursing Home (Respondent) (*Withdrawn*)

1033-89-M: International Union of United Plant Guard Workers of America, Local 1962 (Applicant) v. The Sisters of St. Joseph of the Diocese of Toronto in Upper Canada (Respondent) (*Withdrawn*)

1428-89-M: Christian Labour Association of Canada (Applicant) v. Benevolent Society 'Heidehof' Home for the Aged (Respondent) (*Withdrawn*)

1645-89-M: Amalgamated Transit Union, Local 113 (Applicant) v. Toronto Transit Commission (Respondent) (*Granted*)

1934-89-M: Canadian Union of Public Employees, Local 167 (Applicant) v. The Regional Municipality of Hamilton-Wentworth (Respondent) (*Withdrawn*)

2256-89-M: The Ottawa Roman Catholic Separate School Board (Applicant) v. Canadian Union of Public Employees, Local 2357 (Respondent) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3084-88-OH: William James Kerr (Complainant) v. W.C. Wood Co. Ltd. (Respondent) (*Dismissed*)

0356-89-OH: United Brotherhood of Carpenters & Joiners of America, Local 2679 on behalf of workers listed in Schedule 'A' and the workers listed in Schedule 'A' (Complainant) v. Geiger International & Linda Evans (Respondent) (*Withdrawn*)

0815-89-OH: Everette Chapelle (Complainant) v. Toronto Transit Commission Wheel Trans Department (Respondent) (*Dismissed*)

2586-89-OH: Wayne Stevenson (Complainant) v. C.N.C. Machine Inc. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2644-86-M: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Steinberg Inc., Miracle Mart (Respondent) (*Withdrawn*)

1019-88-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 508 (Applicant) v. Commonwealth Construction Company (Respondent) v. Labourers' International Union of North America, Local 1036 (Intervener) (*Withdrawn*)

0841-89-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. S. E. Rozell & Sons Inc. (Respondent) (*Dismissed*)

0842-89-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Spada Sheet Metal Ltd. (Respondent) (*Dismissed*)

0859-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Rosmar Dry-wall & Acoustics Ltd. (Respondent) (*Granted*)

1096-89-G: Labourers' International Union of North America, Local 493 (Applicant) v. Laari Construction (Respondent) (*Withdrawn*)

1588-89-G: International Brotherhood of Electrical Workers, Local 773 of the IBEW Construction Council of Ontario (Applicant) v. Chatham Electric & C.E. Holdings (Respondents) (*Granted*)

1703-89-G: United Brotherhood of Carpenters & Joiners of America, Lake Ontario District Council (Applicant) v. Anzano Construction Ltd. (Respondent) (*Granted*)

1739-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ron Engineering & Construction (Eastern) Ltd. (Respondent) (*Withdrawn*)

1863-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. T. O'Leary Construction Corp. (Respondent) (*Withdrawn*)

2012-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Marzin Construction Division of 731358 Ontario Ltd. (Respondent) (*Granted*)

2047-89-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Traugott Construction (Kitchener) Ltd. (Respondent) (*Withdrawn*)

2049-89-G: Ontario Allied Construction Trades Council (Applicant) v. Electrical Power Systems Construction Association (Respondent) (*Withdrawn*)

2164-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 (Applicant) v. E.S. Fox Ltd. (Respondent) (*Withdrawn*)

2171-89-G: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. King Glass Ltd./King Glass (Respondent) (*Withdrawn*)

2194-89-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Itarcan Construction Inc. (Respondent) (*Granted*)

2238-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Caledonia Concrete Finishing Ltd. (Respondent) (*Granted*)

2306-89-G: Labourers' International Union of North America, Local 837 (Applicant) v. George Robson Construction (Weston) Ltd. (Respondent) (*Granted*)

2334-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. Greenspoon Bros. Ltd. (Respondent) (*Withdrawn*)

2403-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bot Construction (Canada) Ltd. (Respondent) (*Withdrawn*)

2404-89-G: International Union of Bricklayers & Allied Craftsmen (Applicant) v. Reintjes Construction Inc. (Respondent) (*Withdrawn*)

2420-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. Steeplejack Services Ltd. (Respondent) (*Withdrawn*)

2430-89-G: International Union of Bricklayers & Allied Craftsmen (Applicant) v. Cardinal Refractories (Respondent) (*Withdrawn*)

2435-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Acme Plumbing & Heating (Respondent) (*Withdrawn*)

2444-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. Daicon Contractors Inc. (Respondent) (*Withdrawn*)

2448-89-G; 2449-89-G: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Applicant) v. Landar Insulation Corporation Ltd. (Respondent) (*Withdrawn*)

2458-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. Cana Construction Co. Ltd. (Respondent) (*Withdrawn*)

2487-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 853 (Applicant) v. G. L. Fire Protection Ltd. (Respondent) (*Granted*)

2495-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 853 (Applicant) v. Amity Fire Protection Ltd. (Respondent) (*Granted*)

2496-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 853 (Applicant) v. Pioneer Fire Protection Ltd. (Respondent) (*Granted*)

2499-89-G: United Brotherhood of Carpenters & Joiners of America, Local 93 and Sean McKenny (Applicants) v. Concrete Column Clamps (C.C.C.) Ltd., Gaetan Ethier & Claude Gauthier (Respondents) (*Withdrawn*)

2507-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Tal Metal Erectors Ltd. (Respondent) (*Withdrawn*)

2521-89-G; 2522-89-G: Labourers' International Union of North America, Local 493 (Applicant) v. Nu-Style Construction Company (Respondent) (*Withdrawn*)

2524-89-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. 704039 Ontario Ltd. c.o.b. as Construction 2000 (Respondent) (*Granted*)

2529-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Ariss Construction Inc. (Respondent) (*Withdrawn*)

2530-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Gall Construction Ltd. o/a Acapulco Recreational Contractors (Respondent) (*Withdrawn*)

2548-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cosar Contractors Inc. (Respondent) (*Withdrawn*)

2556-89-G: Labourers' International Union of North America, Local 837 (Applicant) v. Milton Bridge Ltd. (Respondent) (*Granted*)

2576-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 853 (Applicant) v. Depend-All Fire Protections Co. Ltd. (Respondent) (*Granted*)

2577-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 853 (Applicant) v. Olympic Fire Protections Co. Ltd. (Respondent) (*Granted*)

2618-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. 828833 Ontario Ltd., c.o.b. as B.A.R. Steel Erectors Mechanical & Welding (Respondent) (*Granted*)

2625-89-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. Heritage Masonry Ltd. (Respondent) (*Withdrawn*)

2633-89-G: The Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. D. & L. Masonry (Respondent) (*Withdrawn*)

2641-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Retail Environments Construction Ltd. (Respondent) (*Dismissed*)

2669-89-G: Labourers' International Union of North America, Local 607 (Applicant) v. Bay-Walsh Ltd. (Respondent) (*Withdrawn*)

2678-89-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Aggressive Metals Inc. (Respondent) (*Withdrawn*)

2697-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Steve Barisic Carpenter (Respondent) (*Granted*)

2700-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Domingo's Contractor Carpenters (Respondent) (*Granted*)

2722-89-G: Ontario Provincial Conference of the International Association of Bricklayers & Allied Craftsmen, and International Association of Bricklayers & Allied Craftsmen, Local 4 (Applicants) v. Plibrico Ltd. (Respondent) (*Withdrawn*)

2733-89-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Riant Construction (Respondent) (*Granted*)

2734-89-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. L. G. Barrett Electric (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1780-88-G: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Acme Building & Construction Ltd. (Respondent) (*Dismissed*)

1814-89-M: Hard Rock Paving Co. Ltd. (Employer) v. Canadian Brotherhood of Railway, Transport & General Workers (Trade Union) v. L.I.U.N.A., Ontario Provincial District Council (Intervener #1) v. International Union of Operating Engineers, Local 793 (Intervener #2) (*Withdrawn*)

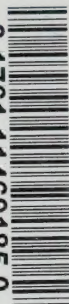
2215-89-R: Teamsters Local No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Apache Concrete Inc. (Respondent) (*Withdrawn*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

ISSN 0383-4778

023230031

NOV 7 1990



3 1761 11469185 0